Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

MEREDITH KILLINO and JOAN KILLINO,

Petitioners,

v.

RIVERSIDE SCHOOL DISTRICT, JOHN F. ROONEY, Superintendent JANET KRESGE, DEBORAH KAPLAN, JOHN VOYTKO, and JOSEPH MUCEYUNAS, teachers, JACK HELCOSKI, Supervisor of Pupil Personnel and J. DENNIS KRYZANOWSKI, Principal,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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47pp

QUESTIONS PRESENTED

I

Under Fed. Rules Civ. Proc. Rule 56(c) can summary judgment be granted when a genuine issue of material fact exists as to whether an Americans with Disabilities, Section 504, and Section 1983 plaintiff had been evaluated to determine the status, nature and extent of her disability?

II

Under the Americans with Disabilities Act can a summary judgment motion, premised on the assertion that the plaintiff has not been evaluated to determine the status, nature and extent of her disability, be granted when the plaintiff was previously regarded as being disabled?

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OPINIONS BELOW

The Memorandum of the District Court granting summary judgment is set out in the appendix at App. 9. The unreported opinion of the Third Circuit Court affirming the District Court's decision is set out in the appendix at App. 1. The denial of the petition for rehearing, unreported, is set out in the appendix at App. 21.

STATEMENT OF JURISDICTION

Meredith and Joan Killino commenced this action against Riverside et al. in the Middle District of Pennsylvania, under 29 U.S.C. §§ 1331, 1343, and 1367. The District court had jurisdiction because this case was filed pursuant to the first, ninth and fourteenth amendments to the Constitution of the United States and under Section 504 of the Rehabilitation Act of 1973, together with its implementing regulations, 34 C.F.R. § 104 and the implementing Pennsylvania State regulations at 22 Pa. Code, Chapter 15, the Americans with Disabilities Act and 42 U.S.C. § 1983 and the common law. On June 17, 1998 the District Court entered a final order dismissing the case pursuant to Riverside's Fed. Rules Civ. Proc. Rule 56(c) motion for summary judgment. That decision was timely appealed to the Third Circuit Court of Appeals and on August 16, 1999 an opinion was filed affirming the District Court's decision. A timely petition for rehearing was filed and denied on September 17, 1999. The Supreme Court granted an extension of time within to file a Petition for Writ of Certiorari to February 14, 2000. The Petition for Writ of Certiorari is being mailed this 14th

day of February 2000. This court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions of Fed. Rules Civ. Proc. are set out in the appendix at App. 27. Further, the relevant provisions of Section 504 of the Rehabilitation Act of 1973 are set forth in the appendix at App. 24 along with the relevant portion of the Americans with Disabilities Act at App. 23 and Section 1983 of the Civil Rights Act is set out at App. 24.

STATEMENT OF THE CASE

On December 8, 1995 Petitioners, Meredith and Joan Killino, brought an action against Respondents, Riverside School District ("Riverside") pursuant to the first, ninth and fourteenth amendments of the Constitution and under Section 504 of the Rehabilitation Act of 1973, Section 1983 of the Civil Rights Act and the Americans with Disabilities Act and pursuant to other state tort claims as well. The action seeks relief from Riverside's discrimination against Meredith, a minor, who attended their school. In January of 1992 Meredith was diagnosed by Dr. Lilik, a pediatric neurologist as suffering from Attention Deficit Disorder ("ADD"). A student who suffers from ADD is entitled to educational accommodations by statute. Although Meredith received some accommodations for her disability, Riverside did not comply with the

requirements of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and its implementing regulation 34 C.F.R. § 104. Riversides refusal to comply with these statutes and regulations deprived Meredith of a free and appropriate public education.

Riversides school psychologist Dr. Balardi evaluated Meredith in September of 1994. The evaluation culminated in a draft service agreement designed to specifically accommodate Meredith's educational needs. App. at 14. Joan Killino repeatedly requested that Riverside sign and implement it but they refused. It was just that type of opposition from Riverside which forced the petitioners to seek various relief in the form of a state level due process administrative hearing. At issue in that proceeding was Riversides refusal to comply with the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and its implementing Regulation 34 C.F.R. § 104. On September 25, 1995 Dr. Smith, the hearing officer, denied Meredith's claim. App. at 4. The result of that proceeding was merely the production of a record to show the disagreement, dispute, and conflict surrounding Meredith's battle to receive accommodations. Of the conflicts most pertinent to this case is the disagreement surrounding the 1994 evaluation. Through her testimony, Joan Killino characterizes the petitioners as being fully cooperative. Mr. Balardi, however, characterizes the petitioners as being uncooperative.

The December 8, 1995 action arises in part out of an appeal of Dr. Smith's ruling and also to seek relief for Riverside's discrimination against Meredith by refusing to comply with the statutes and regulations intended

insure that disabled students receive a free and appropriate public education. Surprisingly, on June 17, 1998 District Court Judge Caputo granted Riverside's motion for summary judgment. The motion was premised on the claim that because Meredith had not been evaluated to determine the status, nature, and extent of her disability a claim for relief based on her protected status must fail as a matter of law. The parties were in complete and utter disagreement on the evaluation issue, for which there is testimony and evidence to show the same. Nonetheless, the District Court made an inappropriate factual determination that Meredith was not evaluated and granted summary judgment on that determination. The Third Circuit Court affirmed that departure from the summary judgment standard in an opinion dated August 15, 1999. Further, the request for rehearing was denied on September 17, 1999.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Judicial Integrity and Public Importance

The Third Circuit has created an important question under Fed. Rules Civ. Proc. Rule 56(c) as to whether or not they can make a material fact determination and according to that finding decide a case as a matter of law. This court has made it clear that the judge's function in a summary judgment decision is not himself to determine the truth of the matter but to determine whether there is a genuine issue for trial *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Nonetheless, the Third Circuit acted in direct defiance of their function

when they made a material fact determination in this case and granted summary judgment according to that determination. In deciding a genuine issue of material fact, the Third Circuit has not only undermined the Federal Rules of Civil Procedure but it has also usurped the function of the jury.

The issues presented in this case are worthy of being considered by the Supreme Court because this Court has made it clear that summary judgment can not be granted when there are unresolved material fact issues. *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). The Third Circuit's disregard for this courts mandate should be addressed. More importantly, the abuse and undermining of the federal rules must be corrected to preserve the functioning of our system and deter future violations. When the Third Circuit becomes a rule breaker it breeds contempt for the rules and invites judges, practitioners, and parties alike to disregard the rules themselves.

The Third Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the District Court as to call for an exercise of this court's supervisory power under Supreme Court Rule 10(a). The Third Circuit did this by affirming the District Court's erroneous ruling and basing their decision of the case as a matter of law on a material fact determination either assumed from the lower court or made themselves. The departure and sanctioning present in this case is worthy of being addressed by the Supreme Court because the Court can send a signal to every judge and practitioner through one case. The lower court's determination of a genuine issue of

material fact in violation of the Federal Rules of Civil Procedure should not be tolerated by the Supreme Court.

In granting and affirming summary judgment the courts below have ruled in conflict with this court's holding that summary judgment cannot be granted when a genuine issue of material fact exists.

The genuine issue of material fact precluding summary judgment in this case is whether or not Meredith was evaluated to determine the status, nature and extent of her disability so that she may receive the accommodations required by the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973 and 42 U.S.C. § 1983. Summary judgment cannot be granted unless the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. Rules Civ. Proc. Rule 56(c) 28 U.S.C.A. "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Incorporated*, 369 U.S. 654, 655, 82 S. Ct. 993, 994 (1962). Further, on summary judgment the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in her favor. *Adickes v. S. H. Kress & Company*, 398 U.S. 144, 158-159, 90 S. Ct. 1598, 1608-1609 (1970); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986); *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986); *Eastman Kodak v. Image Technical Services, Inc.*, 504 U.S.

451, 455, 112 S. Ct. 2072, 2076 (1991). Thus, all of Meredith's evidence is to be presumed correct and all inferences are to be drawn and viewed in her favor, as the nonmoving party. Moreover, the moving party, Riverside, has the burden of establishing the nonexistence of a genuine issue as to any material fact. *See Adickes v. S. H. Kress & Company*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970). Where a motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. Id. Riverside has not met their burden of establishing the absence of a genuine issue as to whether or not Meredith was evaluated and therefore it was inappropriate to grant summary judgment in this case.

Riverside contends that Meredith was never evaluated to determine the status, nature and extent of her disability. Contrarily, Meredith contends that she was evaluated by Riverside's school psychologist, Mr. Balardi. The evaluation, which commenced in September of 1994 and was completed in November of that same year, is evidenced by the draft service agreement Mr. Balardi prepared.[1] Joan Killino repeatedly requested Riverside sign and implement the service agreement. This is evidenced by the October 1995 letter.[2] Further, the record in this case includes testimony from Joan Killino which

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[1] A cursory review of the draft service agreement uncovers insight into Meredith's unique needs which could not be had without an evaluation.

[2] In that letter Joan Killino vehemently requested that Riverside implement the service agreement Mr. Balardi drafted.

reiterates Meredith's position that she cooperated with and had been evaluated by Mr. Balardi.[3]

Although, Riverside contends Meredith was never evaluated, an affidavit from Mr. Belardi to counter Meredith's position that she had been evaluated does not exist. To support their motion for summary judgment Riverside did, however, provide an affidavit from a school guidance counselor which makes no mention of the 1994 evaluation. Nonetheless, Riverside failed to meet their burden of establishing that no genuine issue exists as to the 1994 evaluation. When Meredith's evidence is presumed correct and all justifiable inferences from the above facts are drawn in the light most favorable to her, the only logical conclusion is that a genuine issue exists as to whether or not Meredith was evaluated. Therefore, summary judgment was inappropriate in this case because a genuine issue of material fact exists as to whether or not Meredith was evaluated to determine the status, nature and extent of her disability so that she may receive the accommodations required by the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973 and 42 U.S.C. § 1983, and etc.

The genuine dispute as to whether or not Meredith was evaluated is a material fact issue. A material fact is one which might affect the outcome in the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Summary judgment is precluded when a genuine issue exists as to a fact that might affect the

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[3] There is an abundance of testimony from Joan Killino which is in direct conflict with Riverside's version of the 1994 evaluation.

outcome of the case under governing law. *Id.*; Fed. Rules Civ. Proc. Rule 56(c) 28 U.S.C.A. A materiality determination rests on the substantive law; it is the substantive law that identifies the critical facts from the irrelevant facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Under the substantive discrimination and educational law including § 504 of the Rehabilitation Act of 1973 directly and by analogy the evaluation is a material fact issue. *See Andress v. Cleveland Independent School District*, 64 F.3d 176, 178-79 (5th Cir. 1995). Further, the U.S. Department of Education has issued a policy memorandum which states in part that in order to be eligible for § 504 accommodations the child must be evaluated.[4] Had a child refused a § 504 evaluation to determine their handicap status then a claim premised on their handicapped status and accommodation entitlement may fail as a matter of law. *See Gregory K. v. Longview School District*, 811 F.2d 1307, 1315 (9th Cir. 1987). The outcome of a § 504 claim can hinge on whether or not the child had been evaluated. Thus, evaluation is a material fact issue.

The substantive law indicates that Meredith's evaluation is a material fact issue because the outcome of this case hinges on whether or not Meredith had been evaluated, precluding summary judgment. Had there been a determination that Meredith was evaluated than Riverside would not be entitled to judgment as a matter of law. The issue is not merely one of irrelevance which would

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[4] 18 Indiv. Disabil. Educ. L. Rptr. 116 (1991). The memorandum applies to implementing section 504 protections and makes the evaluation central to the process.

not affect the outcome of the case but rather it is clearly the most critical fact issue at hand. The assertion that Meredith had not been evaluated is the premise upon which Riverside based its summary judgment motion. Without the inappropriate determination by the district court that Meredith had not been evaluated Riverside would not be entitled to judgment as a matter of law. Therefore, summary judgment should have been precluded because according to the substantive law, whether or not Meredith was evaluated is a material fact issue which has affected the outcome of this case.

The material fact dispute as to whether or not Meredith was evaluated is genuine. A fact dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). In *Anderson* this court explained the judge's role in deciding summary judgment motions:

> Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

Id.

This court further found that the genuine issue standard mirrors the standard for directed verdict under Federal Rule of Civil Procedure 50(a). A directed verdict should not be granted if reasonable minds could differ as to the import of the evidence. *See Wilkerson v. McCarthy,*

336 U.S. 53, 62, 69 S. Ct. 413, 417 (1949); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251, 106 S. Ct. 2505, 2511 (1986).

In light of the facts and evidence referenced above, mainly the service agreement, the Joan Killino request to implement it and the testimony of Joan Killino, a reasonable jury could conclude that Meredith was in fact evaluated by Mr. Balardi. Therefore, a genuine issue exists regarding the material fact that Riverside evaluated Meredith. The district court clearly was not following this court's directive as to the judge's function in ruling on a summary judgment motion. A lower court characterized the evaluation issue as debatable, nevertheless, the court concluded that an evaluation had not occurred and granted summary judgment on that determination. It is not the function of any lower court to weigh the evidence and determine the truth of the matter. The Third Circuit should have allowed a jury to determine whether or not Meredith had been evaluated.

Reasonable minds could differ on the issue of whether or not Meredith had been evaluated. Take for example the case of *Carroll v. Capalbo*, 563 F. Supp. 1053 (1983). There the court found in any event that a review by the school of the private medical evaluation and the preparation of an Individualized Education Plan itself qualified as an "evaluation" as the term is limned in the regulation. Here Meredith was diagnosed with "ADD" by a board certified pediatric neurologist and analogously a service agreement was prepared. Thus a reasonable mind could conclude that the 1994 Balardi assessment qualified as the required evaluation under the regulations.

The evaluation and assessment of Meredith as a handicapped or disabled student is analogous to the question of whether a rigging foreman had seamen status in *Southwest Marine Inc. v. Gizoni*, 502 U.S. 81, 112 S. Ct. 486 (1991). In that case a rigging foreman who was injured while working on a platform received benefits pursuant to the Longshore and Harbor Workers Compensation Act and also sought relief under the Jones Act. There it was held that an issue of fact existed as to the foreman's seaman status. *Southwest Marine Inc. v. Gizoni*, 502 U.S. 81, 92, 112 S. Ct. 486, 494 (1991). To qualify for relief under the Jones Act one must be classified as a seaman. Similarly, to qualify for relief under Section 504 of the Rehabilitation Act or the Americans with Disabilities Act classification as handicapped or disabled is required.

In *Southwest Marine* the Court explained that summary judgment was inappropriate because reasonable persons applying the proper legal standard could differ as to whether the employee was a member of the crew, a seaman, thereby making it a question for the jury. Just the same, in this case reasonable persons could differ as to whether Meredith had been evaluated, thereby making it a question for the jury. Since summary judgment was inappropriate for *Southwest Marine* it is inappropriate here.

An important question is left unanswered under the Americans with Disabilities Act as to whether a summary judgment motion, premised on the assertion that a plaintiff is not disabled, can be granted when the plaintiff was previously regarded as being disabled.

The Americans with Disabilities Act provides a three prong definition of the term disability. 42 U.S.C.A. § 12102(2). A child who qualifies under any prong is considered to be disabled. The first prong defines disability as any physical or mental impairment that substantially limits a major life activity such as learning. The second prong defines disability as having a record of such impairment. The third prong defines disability as being regarded as having such an impairment.

It is not certain from the lower courts if being regarded as having a disability places Meredith in the protected class for purposes of the Americans with Disabilities Act. The uncertainty exists because none of the lower courts addressed the Act. A possible presumption in this case is that being regarded as disabled is not sufficient to qualify for accommodations under the ADA. The presumption arises because Riverside regarded Meredith as having a disability, Attention Deficit Disorder. That is evidenced by the November 1995 Riverside memo that claims Meredith is to be considered a regular education student without accommodations. It would not be necessary to exclaim that Meredith is a regular education student unless she had previously been regarded by Riverside as being disabled. In spite of the fact that Meredith had been regarded as having a disability, the lower courts granted and affirmed summary judgment, which was premised in part on the assertion that she was not a

member of the protected class. Clarity and guidance is needed on the issue of who is disabled under the ADA and what is required to receive benefits thereunder.

The uncertainty from the lower court rulings allow further speculation. It could be presumed that an evaluation is not required and being regarded as disabled suffices for Meredith to be protected under the Americans with Disabilities Act. But further, it could be presumed the lower courts reasoned that even if Meredith were classified as disabled, her claim for protection would fail as a matter of law because an evaluation was needed to determine the appropriate type of accommodations. Once again the material fact issue of whether or not Meredith had been evaluated affected the outcome in this case. But for the inappropriate factual determination by the lower courts, Riverside would not have been entitled to judgment as a matter of law. Thus, Meredith's evaluation constitutes a genuine issue of material fact precluding summary judgment. Nevertheless, the alternate question still stands as to whether summary judgment can be granted under the Americans with Disabilities Act when a plaintiff is regarded as having a disability for which accommodations are required.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7406

JOAN KILLINO; MEREDITH KILLINO, a minor by her natural parent and guardian, Joan Killino,

Appellants

v.

RIVERSIDE SCHOOL DISTRICT; JOHN F. ROONEY, Superintendent; JANET KRESGE, Teacher; DEBORAH KAPLAN, Teacher; JACK HELCOSKI, Supervisor of Pupil Personnel; J. DENNIS KRYZANOWSKI, Principal; JOHN VOYTKO, JOSEPH MUCEYUNAS

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 95-cv-02083)
District Judge: Honorable A. Richard Caputo

Submitted Under Third Circuit LAR 34.1(a)
July 16, 1999

Before: SCIRICA, NYGAARD and ALITO, *Circuit Judges*

(Filed AUG 16 1999)

OPINION

PER CURIAM.

Appellants filed a complaint on December 8, 1995, alleging that appellees failed to provide reasonable

accommodations and adaptations to appellant Meredith Killino ("Meredith"), as required under federal law in light of Meredith's physical handicap, Attention Deficit Disorder ("ADD"). At the time the complaint was filed, Meredith was a student in the Riverside School District. In addition to claiming that appellees did not adequately accommodate Meredith, appellants maintain that appellees discriminated against Meredith when she was made to run twenty-five laps around the gym on two separate occasions when she forgot her gym clothes. Although appellants' amended complaint seeks declaratory relief and monetary damages, the parties have agreed that the suit is now for damages only.[1] By order entered June 17, 1998, the District Court granted appellees' motion for summary judgment. Appellants filed a timely notice of appeal.

I. Procedural History

This case has a long procedural history dating back to 1992. The dispute between appellants and the Riverside School District began when Meredith was in the seventh grade. During that year, Meredith began exhibiting learning and emotional problems. In January, 1992, Meredith was diagnosed by Dr. Lilik, a pediatric neurologist, as suffering from Attention Deficit Disorder. Meredith's parents then requested that the Riverside School District write a "service agreement" to develop the

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[1] Meredith graduated from high school shortly after appellants filed their amended complaint, and now attends a four year college. Meredith is no longer a minor.

accommodations, adaptations, and modifications in relation to Meredith's learning that her parents believed she was entitled to under both federal and Pennsylvania law. The school district believed, however, that further evaluations of Meredith were required to determine if she was in fact eligible for special education or related services under the applicable law. Meredith's parents disagreed with the school district's assessment that further evaluation of Meredith was required, and in May, 1992, filed suit in the United States District Court for the Middle District of Pennsylvania, together with three other students and their parents. The action was predicated primarily on the Individuals with Disabilities Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and 42 U.S.C. § 1983.

At this point, the Riverside School District sought permission from the educational authorities of the Commonwealth of Pennsylvania to conduct a comprehensive evaluation of Meredith to determine whether she was eligible for special education and related services under IDEA and 22 Pa. Code, Chapter 14; or whether she was a protected student under § 504 of the Rehabilitation Act. After a due process hearing, a Pennsylvania Special Education Hearing Officer granted the school district's request for a comprehensive evaluation of Meredith. The parents appealed. A Special Education Appeal Panel affirmed the decision of the hearing officer. The parents then sought relief from the District Court, and the action was consolidated with the action previously filed in the District Court. The District Court granted the school district's motion to dismiss, reasoning that § 1415(f) of IDEA required that the plaintiffs exhaust administrative

remedies provided for under the Act. *Killino v. Riverside School District*, Civ. No. 92-cv-0739 (M.D. Pa. September 3, 1993) ("*Killino I*").

Meredith's parents continued to refuse to allow the school district to evaluate their daughter. In June, 1994, they filed a second action in District Court asserting similar allegations as those raised in the first suit. Once again, the District Court granted the school district's motion to dismiss for failure to exhaust administrative remedies. *Killino v. Riverside School District*, Civ. No. 94-cv-1018 (M.D. Pa. January 3, 1995) ("*Killino II*"). In response, Meredith's parents requested a due process hearing in accordance with § 1415 of IDEA. The issue before the hearing officer was whether Meredith was discriminated against when she was made to run laps for forgetting her gym clothes on February 14, 1994, and March 7, 1994, because forgetfulness was a manifestation of her handicap, namely ADD. The hearing officer ruled that because the required evaluations of Meredith had not occurred due to her parents' refusal to allow the school district to conduct the evaluations, Meredith was neither classified as an eligible student under IDEA, nor a protected handicapped student under Section 504, at the time of the alleged discrimination. Consequently, any claim of discrimination on the basis of Meredith's handicap was invalid.

The decision of the hearing officer was unanimously affirmed by the appeal review panel. Meredith's parents continued to resist all attempts made by the school district to evaluate Meredith to determine her eligibility for special services. Instead, appellants initiated this action by once again filing suit in the United States District

Court for the Middle District of Pennsylvania. The basic allegations are the same as in the previous two lawsuits, plus additional claims against two teachers who taught Meredith in the seventh and tenth grades.[2]

II. Standard of Review

We exercise plenary review over a District Court's grant of summary judgment. A grant of summary judgment will be affirmed if our review reveals that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the facts in the light most favorable to the party against whom summary judgment was entered. *See Coolspring Stone Supply, Inc. v. American States Life Ins. Co.*, 10 F.3d 144, 146 (3d Cir. 1993).

III. Discussion

In their briefs, appellants concede that Meredith is not eligible for IDEA services and seek relief based upon § 504 of the rehabilitation Act. Appellants maintain that the evaluations the school district requested to perform were therefore not required and hence Meredith was protected under § 504 when she was medically diagnosed

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[2] It is unclear whether appellants have exhausted administrative remedies as to the claims against these two teachers. Because we conclude that no genuine issue of material fact exists, however, we will affirm the District Court's dismissal of the complaint on that basis.

with ADD in 1992. After reviewing § 504 and its implementing regulations, we agree with every administrative panel which has reviewed this case, as well as with the District Court, that both § 504 and IDEA require a preplacement evaluation the likes of which Meredith never received due to a complete refusal on the part of Meredith and her parents to submit to evaluations requested by the school district and ordered by two separate special education appeals panels.

The Rehabilitation Act of 1973 prohibits discrimination of the basis of a disability in federally funded programs. In order to establish a violation of § 504, appellants must establish that: (1) Meredith was a "handicapped person" as defined by the Act; (2) Meredith was "otherwise qualified" to participate in school activities; (3) the school or the board of education received federal financial assistance; and (4) Meredith was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. *See Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 253 (3d Cir. 1999). A "handicapped person" is described as any person who has a physical or mental impairment which substantially limits a major life activity (e.g., learning). 34 C.F.R. § 104.3(j). Appellants assert that because Meredith was medically diagnosed as having ADD, she is a "handicapped person" within the meaning of § 504 and entitled to its protections.

The regulations implementing § 504 of the Act provide:

> (a) Preplacement evaluation. A Recipient that operates a public elementary or secondary education program shall conduct an evaluation in

> accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.
>
> (b) Evaluation procedures. A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services . . .

34 C.F.R. § 104.35. A preplacement evaluation is thus mandatory to determine whether a person qualifies for § 504 services. The school district is afforded discretion to determine the standards and procedures for the preplacement evaluation. In evaluating a child, the school must "draw upon information from a variety of sources." 34 C.F.R. § 104.35(c). These sources included aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. *Id.*

In addition, the Department of Education has issued a policy memorandum clarifying the circumstances under which children with ADD are eligible for special education services under IDEA and § 504. In regard to § 504, the Department states that depending on the severity of their condition, a child with ADD *may* fit within the definition of "handicapped person." Furthermore, "if parents believe that their child is handicapped by ADD, the LEA must evaluate the child to determine whether he or

she is handicapped as defined by Section 504." Joint Policy Memorandum, Sept. 16, 1991, U.S.D.E., reprinted in 18 Indiv. Disabil. Educ. L. Rptr. at 118. Because appellants refused to permit Riverside School District to evaluate Meredith in a manner which would enable it to make a determination as to whether Meredith's ADD was of sufficient severity to qualify her as a "handicapped person" within the meaning of § 504, she is not entitled to enforce rights available only to those who have been deemed eligible under § 504.

In so far as appellants amended complaint seeks damages for violation of 42 U.S.C. § 1983 and other asserted rights, these claims fail to raise a genuine issue of material fact.[3]

IV. Conclusion

Because the record reveals that no genuine issue of fact exists as to whether Meredith was evaluated to determine whether she was a "handicapped person" within the meaning of § 504, we will affirm the order of the District Court.

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[3] For example, appellants allege that "[a]s a result of the School District's custom and policy, other students were provided accommodations without any testing or identification that the minor Plaintiff was required to undergo after her accommodations were taken away." Amended complaint at 13. Appellants have not demonstrated that a genuine issue of material fact exists as they have produced no evidence in support of their claim. Vague and ambiguous claims cannot defeat a motion for summary judgment. *See Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 254 (3d Cir. 1999).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MEREDITH KILLINO, ET AL.,	:	
Plaintiffs,	:	3:95-CV-2083
vs.	:	(JUDGE CAPUTO)
RIVERSIDE SCHOOL DISTRICT, ET AL.,	:	
Defendants.	:	

MEMORANDUM

(Filed Jun. 17, 1998)

Plaintiffs filed the present action on December 8, 1995, alleging that defendants failed to provide Meredith, a minor at the time, who was medically diagnosed with Attention Deficit Disorder ("ADD"), with reasonable accommodations and adaptations as required under federal law.[1] Before the Court is defendants' motion for summary judgment. The case has been referred to United States Magistrate Judge Raymond J. Durkin. After hearing oral argument on defendants' motion, the Magistrate Judge issued a Report and Recommendation that defendants' motion for summary judgment be granted. Pursuant to Local Rule 72.3, plaintiffs have filed objections to

---

[1] Since the filing of the complaint, Meredith has graduated from high school and is now attending a four-year college. Accordingly, the request for declaratory relief has been dropped and the parties agree that this action is now one for damages only.

the Report and Recommendation. Defendants have filed a reply to plaintiffs' objections.

I. PROCEDURAL HISTORY

This case has a long and complicated procedural history. While Meredith was in seventh grade, a dispute arose between the school district and Meredith's parents as to whether the school district had sufficient data to write a "service agreement" to develop the adaptations, accommodations and modifications required for Meredith in regular education as well as an in-service training program for the faculty and staff.[2] (Rep. & Recommendation at 6.) The school district believed further evaluations were necessary, and Meredith's parents disagreed.

In May of 1992, toward the end of Meredith's seventh grade year, plaintiffs initiated an action in the United States District Court for the Middle District of Pennsylvania, together with three of the students and their parents. The action was predicated primarily on the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the Civil Rights Act, 42 U.S.C. § 1983.

At this point, the school district sought permission from the educational authorities of the Commonwealth of Pennsylvania to conduct a comprehensive evaluation of

---

[2] As there have been no objections to the Report and Recommendation's review of the procedural history of this case, we will briefly summarize the procedural history discussed in greater length in the Report.

Meredith to determine whether she was an eligible student entitled to special education and related services under IDEA and 22 Pa. Code, Chapter 14; or a protected handicapped student under § 504 of the Rehabilitation Act. After a hearing, a Pennsylvania Special Education Hearing Officer granted the school district's request for a comprehensive evaluation of Meredith. The parents appealed and the Appeals Panel affirmed the decision in favor of the school district. The parents thereafter appealed the ruling of the Appeals Panel, and the appeal was consolidated with the action previously filed in this district court.

On September 3, 1993, the district court granted the school district's motion to dismiss, reasoning that section 1415(f) required the plaintiffs to first exhaust the elaborate administrative remedies provided under IDEA. *See Killino v. Riverside School District*, No. 92-CV-0739 (M.D. Pa. September 3, 1993) (*"Killino I"*).

After the decision, the parents continued to refuse to allow the school district to evaluate Meredith. Instead, plaintiffs filed a second action in June 1994, asserting similar allegations. The court again granted the school district's motion to dismiss for failure to exhaust administrative remedies. *Killino v. Riverside School District*, No. 94-1018 (M.D. Pa. Jan. 3, 1995) (*"Killino II"*).

In response to the district court's second ruling, plaintiffs requested a due process hearing in accordance with § 1415 of IDEA. On September 25, 1995, the hearing officer ruled that Meredith could not be considered a protected handicapped student under Section 504 in light of the persistent refusal of Meredith and her parents to

submit to an evaluation to determine Meredith's need for education accommodations. An appeals review panel held:

> the fact remains that Meredith still has not been evaluated. Absent such an evaluation, the District and this Panel are without authority to declare that Meredith is an eligible student under IDEA or a protected handicapped student under Section 504. Until such time as Meredith's comprehensive evaluation is completed, and the multi-disciplinary team arrives at a decision concerning her status, Meredith's pendent placement will remain what it is today – in regular education.

After this decision, Dr. John Rooney, the Superintendent, informed Meredith's teachers that Meredith, now in eleventh grade, was to be considered a regular student without adaptations.

II. STANDARD OF REVIEW

When objections are filed to a Report and Recommendation of a Magistrate Judge, the court must make a *de novo* determination of those portions of the Report to which objections are made. 28 U.S.C. § 636(b)(1)(C); *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989); *Owens v. Beard*, 829 F. Supp. 736, 738 (M.D. Pa. 1993). The court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. 28 U.S.C. § 636 (b)(1); *Owens*, 829 F. Supp. at 738. Although the review is *de novo*, the court is permitted by statute to rely on the Magistrate Judge's proposed recommendations to the extent the court, in the exercise of

sound discretion, deems proper. *United States v. Raddatz*, 447 U.S. 667, 676, 100 S. Ct. 2406, 2413 (1980); *Goney v. Clark*, 749 F.2d 5, 7 (3d Cir. 1984); *Ball v. United States Parole Commission*, 849 F. Supp. 328, 330 (M.D. Pa. 1994).

III. DISCUSSION

The express language of the regulations of the United States Department of Education implementing Section 504, provides:

> a) Preplacement evaluation
>
> A recipient that operates a public elementary or secondary education program *shall* conduct an evaluation in accordance with the requirements of paragraph (b) . . . *before taking any action* with respect to the initial placement of the person in a regular or special education program. . . .

34 C.F.R. § 104.35(a) (emphasis added).

In addition, the Department of Education issued a policy memorandum to clarify the circumstances under which children with ADD are eligible for special education services under both the IDEA and Section 504, stating:

> [State and local educational agencies] have an affirmative obligation to evaluate a child who is suspected of having a disability to determine the child's need for special education and related services. . . .
>
> A [local equational agent ("LEA")] may not refuse to evaluate the possible need for special education and related services of a child with a prior medical diagnosis of ADD solely by reason

> of that medical diagnosis. However, a medical diagnosis of ADD alone is not sufficient to render a child eligible for services under Part B. . . .
>
> Under Section 504, if parents believe that their child is handicapped by ADD, the LEA must evaluate the child to determine whether he or she is handicapped as defined by Section 504.

Joint Policy Memorandum, Sept. 16, 1991, U.S.D.E., reprinted in 18 Indiv. Disabil. Educ. L. Rptr. at 118.

Based on the foregoing, the Magistrate Judge concluded that a preplacement evaluation is required to determine eligibility for services and accommodations under IDEA and Section 504. Because plaintiffs refused to permit Meredith to undergo the evaluation, the Magistrate Judge recommended that defendant's motion for summary judgment be granted.

The Court must review *de novo* those portions of the Report to which objections are made. *See* 28 U.S.C. § 636 (b)(1)(C). We will therefore address each of plaintiffs' objections separately. For the sake of convenience, we will assume the parties are familiar with the analysis in the Report and Recommendation.

A. The "Service Agreement"

Plaintiffs object to the finding by the Magistrate Judge that Mr. Bilardi, an independent psychologist, was unable to complete an evaluation on Meredith. Plaintiffs contend that a draft of a "service agreement" under Section 504, to identify and provide accommodations for Meredith, was completed by Mr. Bilardi; but that the school district refused to sign the service agreement.

Plaintiffs, however, have not submitted any evidence to support this argument. Plaintiffs point to the affidavit of Jack Helcoski, the local educational agent for the school district, who testified that he did meet with Mr. Bilardi about starting an informal evaluation and drafting a service agreement. Nevertheless, such evidence does not establish that the school district was at fault for the failure to execute the service agreement. Indeed, the testimony presented is to the contrary. Mr. Bilardi testified that the attempt to reach a compromise in the form of a service agreement failed because of Mrs. Killino, not the school district:

> So I took Mrs. Killino's ideas, data from the rating scales and I put together a draft document in the format of a service agreement. I had sent Mrs. Killino a copy. I had given the district a copy. And I retained a copy in my word processor so it was just open.
>
> What is was was that Mrs. Killino was going to get back to me with corrections, additions, slashes, or whatever that needed to be on there. That didn't work out. I didn't receive a corrected copy or a copy that she had worked on.

(Doc. No. 29, Rec. of second due process hearing at 290-91.)

Thus, there is no genuine issue of material fact as to whether the school district was at fault for the failed service agreement. Moreover, we agree with the Magistrate Judge that any attempt to negotiate a settlement by executing a service agreement does not indicate recognition by the school district that an evaluation of Meredith

was not really necessary. *See Dubois v. Connecticut State Bd. of Educ.*, 727 F.2d 44, 48-49 (2d Cir. 1984).

Finally, considering the restrictions placed on Mr. Bilardi in drafting the service agreement, it is debatable whether the school district should have used it as a substitute for the required evaluation. For example, Mr. Bilardi testified that he was very limited in his ability to develop a program for Meredith:

> The parameters in which I was given parental agreement that I could work with were very narrow. I could not work individually with Meredith. I could not observe her in the classroom . . . it was decided that I would only speak with the teachers in the presence of Mrs. Killino. I was not given, I would think, general permission to review the extensive records.

(Doc. No 29, Rec. of second due process hearing at 280-81.)

Accordingly, we find no error in the Magistrate Judge's finding that Mr. Bilardi was unable to complete an evaluation of Meredith.

B. Dr. Lilik's Examination

In response to defendants' motion, plaintiffs point out that the hearing officer found the diagnosis and evaluation by Meredith's physician, Dr. Lilik, sufficient with respect to the medical portion of the evaluation. Plaintiffs therefore argue that because Meredith's ADD was a physical impairment, further evaluations were not necessary. The Magistrate Judge rejected this argument stating:

> the hearing officer specifically provided that Dr. Lilik's evaluation would suffice *only* for the *medical* assessment portion of the process, and for Meredith to be found entitled to the accommodations she sought, the law requires other types of evaluation such as psychological, educational, social and emotional evaluations which Meredith and her parents specifically refused.

(Rep. & Recommendation at 18) (emphasis in original).

Plaintiffs object to this finding. Plaintiffs assert that nowhere in Section 504 is the all-encompassing evaluation proposed by the school district required. We disagree. Section 504 provides that school districts must consider a variety of sources in making placement decisions, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. *See* 34 C.F.R. § 104.35(c)(1). Moreover, the policy memorandum issued by the Department of Education specifically provides that a medical diagnosis of ADD alone is insufficient to render a child eligible for special education services under both IDEA and Section 504. Joint Policy Memorandum, Sept. 16, 1991, U.S.C.E., reprinted in 18 Indiv. Disabil. Educ. L. Rptr. at 118. Accordingly, there is no genuine issue of material fact as to whether Dr. Lilik's diagnosis and medical evaluation was sufficient to render Meredith eligible under IDEA and Section 504.

C. Voluntary Accommodations by Teachers

The Magistrate Judge found that even though some teachers voluntarily afforded Meredith accommodations, this did not raise a genuine issue of material fact as to

whether Meredith was eligible under IDEA and Section 504, and therefore entitled to those accommodations. Plaintiffs object to this finding and argue that they have documented that Meredith was specifically provided accommodations. Plaintiffs further contend that other students were provided accommodations without being required to undergo an evaluation.

We fail to see how the fact that some teachers voluntarily chose to provide Meredith and other students with accommodations obviates the statutory requirement that Meredith undergo a preplacement evaluation. Plaintiffs seek to enforce rights available only to those who are determined to be eligible under IDEA and Section 504. In order to be eligible, the regulations of the Department of Education specifically require that a school district conduct an evaluation. See 34 C.F.R. § 104.35(a). Due to plaintiffs' refusal to permit Meredith to be evaluated, Meredith was not eligible to receive accommodations under IDEA and Section 504. We agree with the Magistrate Judge that voluntary accommodations by some teachers do not waive the requirement that Meredith be evaluated and create an entitlement to those accommodations.

D. Who Determines the Content of the Evaluation

In the Report and Recommendation, the Magistrate Judge found that Mrs. Killino did identify one single test, the TOVA,which "would probably be a very viable measure." (Rep. & Recommendation at 20.) Nevertheless, the Magistrate Judge concluded that nothing in either IDEA or Section 504 affords parents the standing to dictate the

content of a preplacement evaluation. Plaintiffs object to this finding. Plaintiffs contend that whether they "dictated" the content or tried to be a part of it are clearly issues of triable fact.

We agree with the Magistrate Judge that the language of the implementing regulations provides the school district with the discretion to determine the standards and procedures for the preplacement evaluation. *See* 34 C.F.R. § 104.35(b); 34 C.F.R. § 300.531-532.[3] Moreover, as discussed above, a determination under IDEA and Section 504 cannot rest on a single test or assessment technique. Despite plaintiffs' approval of the TOVA, the school district is required to conduct an evaluation from a variety of sources including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. *See* 34 C.F.R. § 104.35(c)(1); 34 C.F.R. § 300.532(d).

Plaintiffs seek to enforce rights available only to students who are entitled to special education and related services under IDEA and Section 504. When Meredith was in school, however, plaintiffs consistently refused to allow her to undergo a preplacement evaluation to determine whether she was eligible for such accommodations under IDEA or Section 504. Because plaintiffs precluded

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[3] Under the regulations, parents do have the opportunity to challenge the proposed evaluation in a hearing. *See* 34 C.F.R. § 104.36. Plaintiffs, however, have twice had the opportunity to present their objections in due process hearings and both times the hearing officers ruled that an evaluation of Meredith was required.

the school district from completing the required evaluation, plaintiffs cannot not claim that the school district failed to provide accommodations contrary to federal law. Accordingly, the Magistrate Judge' Report and Recommendation will be adopted. Defendants' motion for summary judgment will be granted.

An appropriate order will follow.

June 17, 1998
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7406

JOAN KILLINO; MEREDITH KILLINO,
a minor by her natural parent and
guardian, Joan Killino,

Appellants

v.

RIVERSIDE SCHOOL DISTRICT; JOHN F. ROONEY, Superintendent; JANET KRESGE, Teacher; DEBORAH KAPLAN, Teacher; JACK HELCOSKI, Supervisor of Pupil Personnel; J. DENNIS KRYZANOWSKI, Principal; JOHN VOYTKO; JOSEPH MUCEYUNAS

(D.C. Civ. No. 95-cv-02083)

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*,
SLOVITER, MANSMANN, GREENBERG, SCIRICA,
NYGAARD, ALITO, ROTH, McKEE and
RENDELL, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ Illegible
Circuit Judge

Dated: SEP 17 1999
lmc/cc: Ms. MK
Ms. JK
AEF

42 U.S.C.A. § 12102

As used in this chapter:

* * *

(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * *

---

42 U.S.C.A. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

---

29 U.S.C.A. § 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of

each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of –

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of

sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

Fed. R. Civ. P. 56. Summary Judgment

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

Supreme Court, U.S.
FILED
MAR 16
CLERK

No. 99-1362

In The

Supreme Court of the United States

MEREDITH KILLINO AND JOAN KILLINO,

Petitioners,

v.

RIVERSIDE SCHOOL DISTRICT, JOHN F. ROONEY, JANET KRESGE, DEBORAH KAPLAN, JOHN VUYTKO, JOSEPH MUCEYUNAS, JACK HELCOSKI, J. DENNIS KRYZANOWSKI,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTION PRESENTED FOR REVIEW

The question to which the Petition for Writ of Certiorari in this case addresses itself is more accurately stated as follows:

> Whether the Appeals Court in affirming the district court's decision granting Respondents' motion for summary judgment, when Petitioners offered neither a single legal citation nor a single citation to the administrative record or other evidence to identify a genuine issue of material fact to support their opposition to this motion, has so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power?

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STATUTES INVOLVED IN THE CASE

This case involves the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*[1], the implementing regulations of the United States Department of Education, 34 C.F.R. Part 300, the implementing regulations of the Pennsylvania State Board of Education regulation, 22 Pa. Code Chapter 14, and the implementing standards of the Secretary of the Pennsylvania Department of Education, 22 Pa. Code Chapter 342; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the implementing regulations of the United States Department of Education, 34 C.F.R. Part 104, and the implementing regulations of the Pennsylvania State Board of Education, 22 Pa. Code Chapter 15; the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and the implementing regulations of the

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[1] On June 4, 1997, the President signed into law the Individuals with Disabilities Education Act Amendments of 1997, P.L. 105-17, which reauthorized in substantially revised form the IDEA as it existed at the time of the prior rulings of this Court in this matter. Although substantially revised, the new Act remains substantially identical to its predecessor in all aspects material to these prior rulings. Most notably, the "exhaustion of administrative remedies" provision of the old IDEA, 20 U.S.C. § 1415(f), which underpinned the Court's rulings, is preserved verbatim in the new IDEA, 20 U.S.C. § 1415(l). Similarly, the need for an evaluation as a condition precedent to determining eligibility for services and protections under the IDEA – a provision that will be more significant in the present action than in the previous two – remains fundamentally unchanged in the new Act, *compare* § 1414(a) (new provision) *with* § 1412(2)(C) (old provision). Because the old IDEA was in effect at all time material to the present action, and because the material requirements of the IDEA have remained intact, all citations to the IDEA in this brief shall be to the version in existence prior to June 4, 1997.

United States Department of Justice, 28 C.F.R. Part 35; Section 1983 of the Civil Rights Act, 42 U.S.C. § 1983; the Pennsylvania Political Subdivision Tort Claim Act, 42 Pa. C.S. § 8541 *et seq.*; Federal Rule of Civil Procedure 56; Joint Policy Memorandum, Sept. 16, 1991, United States Department of Education, reprinted in 18 INDIV. EDUC. L. RPTR. 116 (1991). Since these provisions are lengthy, respondents shall set forth their full text in their brief on the merits, in accordance with Supreme Court Rule 24.1(f), in the event that this Court grants the Writ.

STATEMENT OF THE CASE

The parties to this action are Meredith and Joan Killino ("Petitioners" or "the Killinos") and the Riverside School District, John F. Rooney, Janet Kresge, Deborah Kaplan, John Voytko, Joseph Muceyunos, Jack Helcoski, and J. Dennis Kryzanowski ("Respondents" or "the District"). The case below constituted the third go-around for this litigation and, essentially, these parties before the United States District Court for the Middle District of Pennsylvania. In the first action filed in May of 1992, when Meredith Killino was nearing the end of her seventh grade year as a student enrolled in the public schools operated by the District, the Killinos initiated an action, together with three other students and their parents, against the District and various individuals employed by or working on its behalf. The action was predicated primarily upon the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"); and Section 1983 of the Civil Rights Act, 42 U.S.C. § 1983 ("Section 1983"). *See Killino v. Riverside School District*, No. 92-739, Slip Op. at 2 (M.D. Pa.

Sept. 3, 1993) ("*Killino I*"). The lower court granted the District's motion to dismiss, reasoning that Section 1415(f) of the IDEA, 20 U.S.C. § 1415(f), required the Killinos to resort in the first instance to the elaborate administrative remedies afforded by the IDEA prior to pursuing any claims premised on any federal statutory or constitutional provision protecting the educational rights of individuals with disabilities. *See Killino I*, Slip Op. at 3-5.

Also in May of 1992, the District formally sought permission to conduct an evaluation to assess whether Meredith was eligible for special education and related services under Chapter 14 of the regulations of the Pennsylvania State Board of Education, 22 Pa. Code Chapter 14, and the Individuals with Disabilities Education Act or for adaptations to the regular education environment under Chapter 15 of the State Board regulations, 22 Pa. Code Chapter 15, and Section 504 of the Rehabilitation Act of 1973. The parents refused permission to evaluate but insisted that the District recognize Meredith as a child with disabilities. The District requested a due process hearing to override the parents' refusal to permit the proposed evaluation. The Hearing Officer Andrew M. Klein agreed that the District had the right to evaluate Petitioner Meredith Killino (Hearing Officer Klein's Decision, at 4; Opposition Appendix, at 5-6),[2] and on

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[2] The statement of the case is supported by citation to the Appendix to the Writ for Certiorari (hereinafter "Appendix") and the Appendix to the Brief in Opposition to the Writ (hereinafter "Opposition Appendix"). The Opposition Appendix contains the "other relevant opinions, orders, findings of fact and conclusions of law entered in the case by courts or administrative agencies" required by Rule 14.1(i)(ii)

December 10, 1992, a state-level appeals panel ruled that the District was entitled and required to complete an evaluation. (Special Educ. Op. No. 583, at 5, Opposition Appendix, at 21-22).

Despite the admonishment of the court to exhaust IDEA-provided administrative remedies, the Killinos initiated a second action against the District in June of 1994, again premised upon the same core of operative fact that animated the first action: that Petitioner Meredith Killino, a child diagnosed medically as having ADD, was entitled under federal law to accommodations in, and adaptations to, the educational environment, and the District had failed to afford them to her. The factual focus of the second suit was considerably narrower than that of the first suit, as was the asserted jurisdictional basis for the action. *See Killino v. Riverside School District*, No. 94-1018, Slip Op. at 1-2 (M.D. Pa. Jan. 3, 1995) (*"Killino II"*). The Killinos attempted to avoid dismissal by arguing that they had asserted only Section 504 and various constitutional provisions as the jurisdictional basis for the second action and thus should not be subjected to the exhaustion requirements of the IDEA prior to proceeding with their claims. The court disagreed and again granted the District's motion to dismiss for failure to exhaust. Reasoning that the claims raised by the Killinos were within the broad purview of the IDEA, the court concluded that the exhaustion requirement of Section 1415(f) applied to the action regardless of the Killinos' studious attempt to

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which were omitted from the Appendix. For each cite to the Opposition Appendix, both the page of the actual document and the parallel cite to the appendix page will be provided.

avoid citation to it in their complaint. *See Killino II*, Slip Op. at 2-6.

Heeding the direction of the lower court, the Killinos requested a due process hearing in accordance with Section 1415 of the IDEA. Testimony was taken before, and documentary evidence presented to, Hearing Officer Gregory Smith on March 16, April 10, July 7, and August 21, 1995. Dr. Smith issued a decision dated September 25, 1995 in favor of the District, ruling that the District had not discriminated against Meredith when it required her to make up missed physical education classes by walking laps in the High School gymnasium and that, in any event, Meredith could not be considered a protected handicapped student under Section 504 in light of the persistent refusal of Meredith and her parents to permit the District to conduct an evaluation to determine Meredith's need for educational accommodations. (Hearing Officer Smith's Decision, at 6-8, Opposition Appendix, at 36-41). A state-level panel of three appellate hearing officers unanimously upheld this ruling on appeal as follows:

> In spite of the parents' determined efforts to obscure and avoid the present procedural and substantive posture of their case, the fact remains that Meredith still has not been evaluated. Absent such an evaluation, the District and this Panel are without authority to declare that Meredith is an eligible student under IDEA or a protected handicapped student under Section 504. Until such time as Meredith's comprehensive evaluation is completed, and the multidisciplinary team arrives at a decision concerning her status, Meredith's pendent placement will remain what it is today – in regular education. Because Meredith was not a protected handicapped student in 1994 [when

> the make up laps were required and walked in physical education], the hearing officer correctly determined that the District did not discriminate against her.

(Special Educ. Op. No. 693, at 6-7 (PDE 1995), Opposition Appendix, at 48-50). The Killinos filed the present action in December of 1995, following the ruling of the appeals panel on November 10, although service was not effected until April of 1996. In accordance with Section 1415(e)(2) of the IDEA, 20 U.S.C. § 1415(e)(2), the Right to Education Office in Harrisburg, Pennsylvania, filed the entire administrative record of this hearing and administrative appeals therefrom with the lower court in February of 1997.

After proceeding *pro se* initially, the Killinos obtained counsel and filed an amended complaint. The amended complaint added to the claims arising from the physical education make-up incident claims against two additional teachers, Joseph Moceyunas and John Voytko, who taught Meredith Killino mathematics in seventh and tenth grade, respectively. The District and the individual administrators and teachers named as defendants filed a joint answer to the amended complaint and sought summary judgment in their favor on the record then before the court. On March 24, 1998, Magistrate Judge Raymond J. Durkin issued a report and recommendation granting the joint motion for summary judgment. (Appendix, at 9). The Killinos filed objections, and the lower court, in a memorandum decision and order by the Hon. A. Richard Caputo dated and entered on June 17, 1998, adopted the report and recommendation and again granted the joint motion for summary judgment. (Appendix, at 20). The Killinos filed a notice of appeal, and on August 16, 1999, the Third Circuit affirmed the district court's decision. (Appendix, at 8).

COUNTER-STATEMENT OF FACTS

At no point have the Petitioners ever disagreed with the following:

In May of 1992, toward the end of Meredith Killino's seventh grade year, the Riverside School District formally sought permission to conduct an evaluation to assess whether Meredith was eligible for special education and related services under Chapter 14 of the regulations of the Pennsylvania State Board of Education, 22 Pa. Code Chapter 14, and the Individuals with Disabilities Education Act or for adaptations to the regular education environment under Chapter 15 of the State Board regulations, 22 Pa. Code Chapter 15, and Section 504 of the Rehabilitation Act of 1973. The parents refused permission to evaluate but insisted that the District recognize Meredith as a child with disabilities. The District requested a due process hearing to override the parents' refusal to permit the proposed evaluation. On December 10, 1992, a state-level appeals panel ruled that the District was entitled and required to complete an evaluation. (Special Educ. Op. No. 583, at 5, Opposition Appendix, at 21-22).

Following the appeals panel ruling, the District asked an independent school psychologist employed by the Northeastern Educational Intermediate Unit No. 19 ("NEIU"), Lawrence Bilardi, to conduct the evaluation. Despite numerous attempts to convince the parents to cooperate with the specific components of the evaluation ordered by the state-level appeals panel, Mr. Bilardi was unable to complete the evaluation that had been ordered by the panel. The Petitioners continued, however, to insist that the District recognize Meredith as disabled and continued to press legal claims against the District based on the contention that Meredith was disabled.

At the direction of the lower court, following an attempt by the Killinos to maintain an action against the

District and others for allegedly "discriminating" against Meredith by requiring her to run or walk laps to make up for two missed sessions of physical education during the 1993-1994 school year, the parents requested a due process hearing in 1995 to press claims against the District for failure to accommodate Meredith's alleged disability. The sole issue in that hearing was whether the "make-up" laps constituted discrimination in violation of Section 504 of the Rehabilitation Act and Chapter 15 of the regulations of the State Board. The hearing officer found that the District had not discriminated against Petitioner Meredith Killino (Hearing Officer Smith's Decision, at 6; Opposition Appendix, at 36-38); and that hearing culminated in a second ruling, dated November 10, 1995, by a second state-level appeals panel ordering that Meredith be evaluated by a multidisciplinary team prior to receiving special education or regular education accommodations as a student with a disability or a "protected handicapped student" (Special Education Op. No. 693, at 6; Opposition Appendix, at 48-49).

In response to the second panel order, the District asked a second independent school psychologist employed by NEIU, Rita Williams, to evaluate Meredith. Both the Petitioners resisted the efforts of the team to complete the specific components of the evaluation ordered by the appeals panel. The multidisciplinary team, including Ms. Williams, prepared a report of the attempted evaluation. The team concluded that it was unable, in the face of vehement opposition from Petitioners, to assess whether Meredith was eligible for special education and related services in Chapter 14 and 342 of the Commonwealth of Pennsylvania special education regulations and standards, and the IDEA or for adaptations to the regular education environment under Chapter 15 of the State Board regulations and Section 504.

Meredith nevertheless remained a student enrolled in the public schools of the District through June of 1997, when she graduated from high school, having earned all credits required by law and by District policy for graduation. She is currently matriculated at a four year college.

From May of 1992 through June of 1997, when Meredith Killino graduated from high school, Petitioners refused to permit the District to complete the evaluation ordered by the appeals panels.

ARGUMENT

REASONS FOR DENYING THE WRIT

Petitioners offer one main reason to support their demand that the Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit in this case. They assert that, if there is any dispute of fact, Respondents' motion for summary judgement must be denied, and the fact that the Third Circuit did not overrule the district court on this issue was such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power. The Respondents contend, however, that Petitioners have confused the concept of a dispute of fact with a dispute of *material* fact. There is no dispute: Petitioners did not permit Respondents to do the evaluation that two separate state level appeals panels had ordered. The evaluation in question, to determine possible eligibility for special services and protections under either the IDEA or Section 504, was the subject of a final administrative order in a proceeding conducted under Section 1415 of the IDEA, 20 U.S.C. § 1415. The Petitioners never appealed to a state or federal court the decision of the first appeals panel issued on December 10, 1992. That decision thus became final and binding, regardless of whether the Killinos agreed with it.

As the Court of Appeals found, the Petitioners seek to enforce rights available only to those who enjoy the status of "protected handicapped persons." They do so, however, without first permitting the District to conduct the pre-placement evaluation necessary to determine such status. They also seek to raise claims that they have not exhausted through the administrative process required under the IDEA. Because the Court of Appeals *did* apply the correct standard in reviewing a motion for summary judgment, this Court does not need to intervene in this decision. Moreover, this decision of the Third Circuit is completely consistent with all of the other circuit court decisions that have considered the exact issue regarding the ramification of a parents' refusal to allow a school district's right to obtain the evaluation it requires to determine if a student is entitled to special services. *See Andress v. Cleveland Independent School District*, 64 F.3d 176, 178-79 (5th Cir. 1995); *Gregory K. v. Longview School District*, 811 F.2d 1307, 1315 (9th Cir. 1987); *DuBois v. Connecticut State Board of Educ.*, 727 F.2d 44, 48 (2d Cir. 1984). Respondents offer the following elaboration:

I. The Court of Appeals' decision was correct because no material fact is in dispute related to Petitioners refusal to allow Respondents to do the evaluation that the Appeals Panel had ordered, and therefore, based upon consistent caselaw from all the circuits that have ruled on this issue, Respondents are entitled to judgment as a matter of law.

Pursuant to Federal Rule of Civil Procedure 56(c), a motion for summary judgment will be granted

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving

> party is entitled to a judgment as a matter of law.

Boyle v. County of Allegheny, Pennsylvania, 139 F.3d 386, 393 (3d Cir. 1998). Vague and ambiguous claims cannot defeat a motion for summary judgment. *See Ridgewood Board of Educ. v. N.E. ex rel M.E.*, 172 F.3d 238, 254 (3d Cir. 1999). The Petitioners failed below to establish that a genuine dispute of any *material* fact existed in this case and offered neither a single legal citation nor a single citation to the administrative record or other evidence to support their position. When "a motion for summary judgment is made and supported [with affidavits and testimony] as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse parties pleading, but the adverse parties' response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial." FED.R.CIV.P. 56(e). The Third Circuit has offered the following analysis of this provision:

> It is clear . . . that if a moving party satisfies its initial burden of proving a prima facie case for summary judgment, the opposing party "must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). Rather, "[t]here must be sufficient evidence for a jury to return a verdict in favor of the non-moving party; if the evidence is merely colorable or not significantly probative, summary judgment should be granted." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir.1994).

Boyle v. County of Allegheny, Pennsylvania, 139 F.3d at 393.

A. As A Matter of Law, Respondents Are Entitled to Judgement.

Review of applicable law demonstrates why the disputes of fact that are now being raised by Petitioners are not material.

The "pre-placement" evaluation is at the heart of both the IDEA and Section 504. In the regulations of the United States Department of Education implementing Section 504 in the nation's public schools, the need for an evaluation prior to serving a student as a "handicapped person" is unequivocal:

> *(a) Pre-placement evaluation*
>
> A recipient that operates a public elementary or secondary education program *shall* conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.
>
> * * *
>
> *(c) Placement procedures*
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> In interpreting evaluation data and in making placement decisions, a recipient *shall* (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered. . . .

34 C.F.R. § 104.35(a) and (c) (emphasis added). The Section 504 regulations anticipate that parents will receive written notice of the school district-recipient's proposed

evaluation and will have an opportunity to challenge the proposal in a hearing such as the hearing available to parents under the IDEA. *See id.* at § 104.36. The regulation implementing the IDEA is similarly worded. *See* 34 C.F.R. § 300.535(a) ("In interpreting evaluation data and making placement decisions, each public agency *shall* . . . [d]raw upon information from a variety of sources, including aptitude and achievement tests. . . . "). Indeed, the IDEA implementing regulation mandates that to determine the existence, *or absence,* of a "specific learning disability," as defined in the Act, the school district must document the presence of a "severe discrepancy between achievement and ability" in one or more of seven areas of academic achievement. *See id.* at § 300.541(a)(2). The definition of "specific learning disability" embodied in the standards adopted by the Pennsylvania Department of Education to implement the IDEA, moreover, specifically recognize that the required "severe discrepancy" can be the result of, among other things, "deficiencies in initiating or sustaining attention." *See* 22 Pa. Code § 342.1(b).

The Petitioners have twice had the opportunity to present their objections to the District's proposed evaluation in due process hearings and have twice received written rulings requiring the evaluation to proceed as contemplated by Section 104.35 of the Section 504 regulations. They nevertheless continued, inexplicably, to rebuff attempts by the District to complete the required evaluation through the date of their daughter's graduation from High School.

The contention of the Petitioners to the contrary notwithstanding, the presence of a suspected ADD in Petitioner Meredith Killino does not suspend the need for an evaluation. To the contrary, the U.S. Department of Education has issued a policy memorandum advising school districts of the manner in which they must meet the

needs of students presenting ADD-like syndrome under both the IDEA and Section 504:

> In order to be eligible under Part B [the IDEA], a child must be evaluated in accordance with 34 C.F.R. §§ 300.530-300.534 as having one or more specified physical or mental impairments, and must be found to require special education and related services by reason of one or more of these impairments. . . . [State and local educational agencies] must ensure that children with ADD who are determined eligible for service under Part B receive special education and related services designed to meet their unique needs, including special education and related services needs arising from the ADD.
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> * * *
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> [State and local educational agencies] have an affirmative obligation to evaluate a child who is suspected of having a disability to determine the child's need for special education and related services.
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> * * *
>
> [A]n LEA may not refuse to evaluate the possible need for special education and related services of a child with a prior medical diagnosis of ADD solely by reason of that medical diagnosis. However, *a medical diagnosis of ADD alone is not sufficient to render a child eligible for services under Part B.*
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> * * *
>
> Even if a child with ADD is not found to be eligible for services under Part B [the IDEA], the requirements of Section 504 . . . and its implementing regulation at 34 C.F.R. Part 104 may be applicable.

* * *

> Under Section 504, if parents believe that their child is handicapped by ADD, the LEA *must evaluate the child* to determine whether he or she is handicapped as defined by Section 504.

Joint Policy Memorandum, Sept. 16, 1991, U.S.D.E., *reprinted in* 18 INDIV. DISABIL. EDUC. L. RPTR. 116, 117-18 (1991) (emphasis added); (Opposition Appendix, at 54-58). This widely-regarded interpretation of the applicable law by the agency responsible for monitoring and enforcing that law is due considerable deference by this Court. *See Honig v. Doe*, 484 U.S. 305, 325 n. 8 (1988). Because the Petitioners have precluded the District in the present case from completing the evaluation that the law requires and that two impartial administrative appeals panels at the state level have ordered, any claim premised upon the status of Petitioner Meredith Killino as a "protected handicapped student" must fail. The right of a student and his or her parents to expect services and accommodations under the IDEA and, by analogy, under Section 504, necessarily hinges on the ability of the responsible school district to complete the statutorily-mandated evaluation to determine eligibility or continued eligibility. *See Andress v. Cleveland Independent School District*, 64 F.3d 176, 178-79 (5th Cir. 1995). In *Andress*, 64 F.3d at 179, the Fifth Circuit concluded that parents who would not cooperate in permitting the school district to conduct its own *re*-evaluation, much less initial evaluation, had waived their right to seek remedies premised on the theory that their child was protected by the IDEA. This ruling is consistent with the long-standing view that while schools cannot use administrative or judicial process to compel parents to submit their child for evaluation – and indeed Meredith in the present case exercised her "right to refuse" – parents and students who refuse

cannot expect to assert rights against the school that depend upon the completion of such an evaluation. *See Gregory K. v. Longview School District*, 811 F.2d 1307, 1315 (9th Cir. 1987); *DuBois v. Connecticut State Board of Educ.*, 727 F.2d 44, 48 (2d Cir. 1984).

The Killinos offered to the court below little more than the bald assertions contained in their various briefs – unadorned by even the slightest citation to the extensive administrative record or material produced in discovery, much less to affidavits – in support of their attempt to show a dispute of material fact. They offered several "red herrings" to obscure the plain, central reality of this case: that they refused to allow the District to complete the evaluation needed to determine whether Meredith Killino was entitled, during her time as a student in the public schools operated by the District, to the special services and protections afforded by either the IDEA or Section 504.

B. The Appeals Court Correctly Determined That Petitioners Had Not Raised a Genuine Issue of Material Fact

As they did before both the Magistrate Judge, the district court, the Court of Appeals, the Petitioners offer readily-disposable factual distracters in their petition for writ of certiorari. These facts, *even if true*, are not material:

1. Petitioners were willing to allow Meredith Killino to submit to an assessment that she deemed appropriate.

For several reasons, the Petitioners' professed willingness to have had Meredith tested using a single instrument identified by the parent as acceptable in no way

undermines the position of the District. First, the evaluation in question, to determine possible eligibility for special services and protections under either the IDEA or Section 504, was the subject of a final administrative order in a proceeding conducted under Section 1415 of the IDEA, 20 U.S.C. § 1415. The parents never appealed to a state or federal court the decision of the first appeals panel issued on December 10, 1992. That decision thus became final and binding, regardless of whether the Killinos agree with it. *See* 20 U.S.C. § 1415(e)(1) ("A decision made under subsection (c) [state-level administrative review] shall be final, except that any party may bring an action under paragraph (2) [civil action] of this subsection."). Although the Killinos did not even attempt to claim here that they were appealing that 1992 ruling, any attempt to do so now, in an action filed in December of 1995, would be time-barred, *see Jeremy H. v. Mount Lebanon School District*, 95 F.3d 272, 280-81 (3d Cir. 1996); *Tokarcik v. Forest Hills School District*, 665 F.2d 443, 454-55 (3d Cir. 1981),[3] and mooted by the undisputed fact that Meredith has graduated.

Second, nothing in either the IDEA or Section 504 affords to the parents standing to dictate the content of a pre-placement evaluation. The Section 504 regulations plainly establish that the *school district* must conduct the evaluation, *see* 34 C.F.R. § 104.35(a); the *school district* must establish standards and procedures to ensure the proper validation, specificity, and accuracy of testing and assessment instruments, *id.* at § 104.35(b)(1)-(3); and the

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[3] Although the Third Circuit has at times suggested that a six-year statute might apply to IDEA actions, the reasoning and *obiter dictum* of its decisions in this regard have tended toward the two-year period. *See, e.g., Jeremy H.*, 95 F.3d at 280 ("we suggested [in *Tokarcik*] that a two-year period might be appropriate").

school district must ensure that sufficient information is drawn in the course of the evaluation from a variety of sources, "including aptitude and achievement tests," *see id.* at § 104.35(c). The parent is nowhere mentioned in the regulatory outline of the pre-placement evaluation and reevaluation process, either as an informant or a participant. The IDEA regulations are to the same effect. *See id.* at §§ 300.531, 300.532 (using language nearly identical to that used in the Section 504 regulations). Indeed, the parent who refuses to permit a school district to perform its own evaluation, either as part of the initial, pre-placement evaluation, or as part of a periodic review of continued eligibility for special services, risks the loss of protected status for their child. *See Andress v. Cleveland Independent School District*, 64 F.3d 176, 178-79 (5th Cir. 1995) (refusal to allow district to reevaluate homebound child will terminate existing eligibility status); *DuBois v. Connecticut State Board of Education*, 727 F.2d 44, 48-49 (2d Cir. 1984) (parent who would not allow testing by district psychologist to establish eligibility under IDEA [then EHA] could not demand special transportation accommodation).[4]

Third, a determination of eligibility under either the IDEA or Section 504 cannot rest on any single test or assessment technique. Whatever merits the TOVA might have as a diagnostic instrument, the District is required, in its evaluation of a student such as Meredith, to "draw upon information from a variety of sources, *including aptitude and achievement tests*, teacher recommendations, physical condition, social or cultural background, and

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[4] Although both *DuBois* and *Andress* involved claims arising under the IDEA alone, this Court has recognized that the requirements of both statutes, with respect to identification and evaluation of individuals with disabilities, are essentially identical. *See W.B. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995).

adaptive behavior." 34 C.F.R. § 104.35(c)(1) (Section 504 regulations); *see also id.* at § 300.532(d) (IDEA regulations, requiring that school districts ensure that "[n]o single procedure is used as the sole criterion for determining an appropriate educational program for a child").

2. Mr. Bilardi proposed a Section 504 "service agreement" in an attempt to resolve amicably the impasse caused by the refusal of Petitioners to cooperate with the evaluation, thus evidencing that the ordered evaluation was unnecessary.

Even if the initiative of Mr. Bilardi could somehow be attributed to the District, such attempts at reconciliation would nevertheless constitute "conduct or statements made in compromise negotiations" of the sort that the lower court plainly could not have accepted into evidence under Rule 408 of the Federal Rules of Evidence. From 1992 through the date that Meredith graduated in June of 1997, moreover, the consistent position of the District in law and in fact was that Meredith could not be deemed eligible for the special protections of either Section 504 or the IDEA until a pre-placement evaluation had been completed by the District. This case is directly analogous to *DuBois v. Connecticut State Board of Education*, 727 F.2d at 48-49, in which the Second Circuit ruled that a student was not entitled to special transportation services under the IDEA (then EHA) when the parent refused to allow the school district to conduct an evaluation to determine eligibility, even though the district, in an attempt to reach an amicable resolution of its long-standing dispute with the parent, had agreed to place the student in a special school. A similar "red herring" argument exists in the contention of the Killinos that the willingness of some faculty members to make "accommodations" demanded

by the Petitioners constituted an acknowledgment that Meredith was eligible for such accommodations under Section 504. Such conduct hardly vitiates the force of the District's consistently-maintained position that a pre-placement evaluation was necessary to establish Meredith's *entitlement* to the accommodations that the parent demanded.

3. The first Hearing Officer ruled that the medical diagnosis of Attention Deficit Disorder obtained by the parents in 1992 would "suffice" for purposes of the medical portion of the evaluation.

As the definitive policy interpretation of the U.S. Department of Education – quoted from and cited to extensively above – makes clear, "a medical diagnosis of ADD alone is not sufficient to render a child eligible for services under Part B [or under Section 504]." Joint Policy Memorandum, Sept. 16, 1991, U.S.D.E., *reprinted in* 18 INDIV. DISABIL. EDUC. L. RPTR. at 118. The second appeals panel, moreover, reinstated the need for a medical assessment as part of the District's evaluation of Meredith, an evaluation that the Killinos resisted absolutely.

The District at all times in this case endeavored in vain to fulfill its obligations to Meredith against virile parent opposition. As the Joint Policy Memorandum makes clear, a student with ADD might qualify for services as a child with a "specific learning disability," a "severe emotional disturbance," or an "other health impairment" within the meaning of the IDEA and the special education standards and regulations of the State Board of Education and Department of Education, 22 Pa. Code §§ 14.1 and 342.1(b), or for accommodations or "special education and related services" under Section

504 of the Rehabilitation Act of 1973 and Chapter 15 of the regulations of the State Board, 22 Pa. Code Chapter 15. The District sought to complete the evaluation necessary to determine eligibility under either of these statutory-regulatory schemes. Given the potential applicability of either scheme to a child, like Meredith, with ADD, an evaluation designed to rule in or rule out both was entirely reasonable, particularly given that under Pennsylvania law, eligibility for Section 504-Chapter 15 services is predicated expressly upon the ineligibility of the child for IDEA-Chapter 14 services, *see* 22 Pa. Code § 15.2 (definition of "protected handicapped student" at subparagraph (iii)). Petitioners would not allow the District to complete the essential pre-placement evaluation that serves as the *sine qua non* of eligibility. Meredith, moreover, has graduated and is no longer eligible for *any* form of secondary education, much less adapted in the manner that the Killinos contend her secondary education should have been.

II. Regardless of whether there is a genuine issue of material fact, the Petitioners could not have sustained an action based upon claims that they had failed to exhaust through the administrative remedies available under the IDEA.

The lower court, in two unappealed rulings, had twice dismissed actions filed by the Killinos for failure to exhaust administrative remedies. In each of the two previous cases, the same core of operative facts informed the Killinos' position: that Petitioner Meredith Killino has ADD and is therefore entitled to accommodations and services under either the IDEA or Section 504 or both. In its decision in *Killino II* in particular, the lower court went to great lengths to explain that the need to exhaust IDEA administrative remedies could not be avoided merely by

couching the pleadings in terms of Section 504, a point that is evident on the face of the statutory language contained in Section 1415(f) of the IDEA. After the second dismissal for failure to exhaust, the Killinos did request a hearing – limited to the issue of whether the make-up laps required during the 1993-1994 school year in physical education constituted discrimination in violation of Section 504. After the adverse ruling issued by the second appeals panel in November of 1995, Petitioners initiated this action, again essentially limited to the narrow fact pattern raised by the make-up laps. In an amended complaint filed in May of 1997, however, the Killinos sought to raise entirely *new* claims, and even to join entirely new individuals, to the claims exhausted through the administrative process. The only claims submitted to administrative scrutiny in this case were those presented to the lower court in *Killino II*. Those claims related entirely to the make-up laps required of Meredith to avoid an unsatisfactory grade in physical education. Any other claims are not ripe for disposition by this Court. *Killino II* was a sound interpretation and application of law, and it is the law of this case. It should serve to bar any claim other than the 1994 physical education claim, assuming *arguendo*, of course, that the physical education claim can somehow survive the argument against it offered above.

This Court therefore must address the exhaustion argument only if it concludes that the Petitioners can press their discrimination claims despite their refusal to allow the required preplacement evaluation to occur. Section 1415(f) of the IDEA creates a broad-based exhaustion-of-administrative-remedies requirement as follows:

> Nothing under this chapter [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. §§ 790 *et seq.*] or other Federal statutes

> protecting the rights of children and youth with disabilities, *except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.*

20 U.S.C. § 1415(l) (emphasis added). The Petitioners in this case, of course, assert that Meredith was a "protected handicapped person" while a student at Riverside and that she was as a consequence entitled to certain accommodations in the regular education program. Such a contention falls easily within the broad ambit of issues, including nearly anything related to the educational evaluation, classification, program, and placement of children with disabilities, for which administrative review is available and required under the IDEA and its implementing regulations. *See* 20 U.S.C. § 1415(b)(6) (administrative hearing procedures must be available for consideration of "complaints" concerning "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child"). Thus, because the Killinos have raised claims cognizable under the IDEA, they are required to exhaust the IDEA's comprehensive administrative remedies prior to initiating any court action under the IDEA or any other federal statute offering potential protections to students with disabilities. *See W.B. v. Matula*, 67 F.3d 484, 496 (3d Cir. 1995); *Komninos v. Upper Saddle River Board of Education*, 13 F.3d 775, 779 (3d Cir. 1994); *Hoeft v. Tucson Unified School District*, 967 F.2d 1298, 1299 (9th Cir. 1992); *Gardner v. School Board of Caddo Parish*, 958 F.2d 108, 111-12 (5th Cir. 1992); *Christopher W. v. Portsmouth School Committee*, 877 F.2d 1089, 1193-94 (1st Cir. 1989); *Association for Retarded Citizens, Inc. v. Teague*, 830 F.2d 158, 161-62 (11th Cir. 1987); *Frith v. Galeton Area*

School District, 900 F. Supp. 706, 712-13 (M.D. Pa. 1995); *Drinker v. Colonial School District*, 888 F. Supp. 674, 679 (E.D. Pa. 1995); *Carey v. Maine School Administration District No. 17*, 754 F. Supp. 906, 921 (D. Me. 1990); *Waterman v. Marquette-Alger Intermediate School District*, 739 F. Supp. 361, 367-69 (M.D. Mich. 1990); *Howell v. Waterford Public School District*, 731 F. Supp. 1314, 1315 (E.D. Mich. 1990). Failure to exhaust administrative remedies afforded by the IDEA constitutes grounds for granting a motion to dismiss in any case concerning "the identification, evaluation, or educational placement of [a] child, or the provision of a free appropriate public education for such child." *Gardner*, 958 F.2d at 111-12; *see also Hoeft*, 967 F.2d at 1300 (upholding dismissal under Rule 12(b)(6)).

While the exhaustion requirement can be excused if exhaustion would be futile, the burden of pleading and showing how exhaustion is, in fact, excused rests with the plaintiff. *See Honig v. Doe*, 484 U.S. 305, 327 (1988); *Gardner*, 958 F.2d at 112; *Norris v. Board of Education of Greenwood Community School Corp.*, 797 F. Supp. 1452, 1469 (S.D. Ind. 1992). A plaintiff cannot rely on mere conclusory statements to meet this burden. *See Teague*, 830 F.2d at 162. Exhaustion is mandated, after all, because it enables an agency with expertise "to develop a factual record, to apply its expertise to the problem, to exercise its discretion and to correct its own mistakes." *Christopher W.*, 877 F.2d at 1094; *see also Teague*, 830 F.2d at 160 (adding to the foregoing list of purposes "preventing deliberate disregard and circumvention of agency procedures established by Congress"); *W.B. v. Matula*, 67 F.3d at 496 (exhaustion excused only when all factual matters had been resolved by settlement agreement). One can scarcely conceive of a greater need for administrative expertise than in the assessment of whether a child's learning-related behaviors so deviate from the norm that the student could be

considered to have an educational disability. Of equal importance is determining what, if any adaptations to or accommodations in the learning environment will address the unique learning needs of a student. Reaching an answer, if one is possible, to these questions will require considerable educational expertise, the review of which should, in the first instance, be left to experts in the field. Congress has made clear its belief that courts, which are generalists without expertise in the education of children with disabilities, should decide cases arising under the IDEA only after they have received the benefit of a serious and thorough examination of the record by state and local educational agencies devoted to the purpose of educating such children. *See, e.g., Komninos*, 13 F.3d at 779 (the administrative process "offers an opportunity for state and local agencies to exercise discretion and expertise in fields in which they have substantial experience"); *Stauffer v. William Penn School District*, 829 F. Supp. 742, 748-49 (E.D. Pa. 1993) (citing and quoting *Crocker v. Tennessee Secondary School Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989)); *Carey v. Maine School Administrative District No. 7*, 754 F. Supp. 906, 923 (D. Me. 1990). It is not sufficient to excuse the legislatively-intended comprehensive administrative procedure merely to allege that the process is time consuming, *see Stauffer*, 829 F. Supp. at 748-49; *Howell v. Waterford Public Schools*, 731 F. Supp. 1314, 1316 (E.D. Mich. 1990).

Recognizing these fundamental principles governing the interpretation of the IDEA's exhaustion requirement, the Court, in *Komninos v. Upper Saddle River Board of Education* held that exhaustion of IDEA-mandated administrative processes can be excused when an extraordinary "emergency situation" is present. The Court offered the following explanation of this "emergency situation exception" and the heightened burden required to establish it:

> Thus, mere allegations by plaintiffs of irreversible harm will not be enough to excuse the completion of administrative proceedings. Plaintiffs must provide a sufficient preliminary showing that the child will suffer serious and irreversible mental or physical damage (e.g., irremediable intellectual regression) before the administrative process may be circumvented.
>
> In order to meet that threshold, plaintiffs must provide affidavits from competent professionals along with other hard evidence that the child faces irreversible damage if the relief is not granted. If plaintiffs meet that burden but the defendant in connection with a 12(b)(1) motion to dismiss presents convincing evidence that such harm will not occur, the court should not proceed, but rather must require plaintiffs to exhaust their administrative remedies. We leave the means to determine whether the threshold requirements have been met to the discretion of the district court. Tanzymore v. Bethlehem Steel Corp., 457 F.2d 1320, 1323 (3rd Cir.1972); 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure Sec. 1350 (1990).

Komninos, 13 F.3d at 779. The Killinos, of course, did not seek injunctive relief from the lower court. Meredith had graduated before the close of the pleadings. Nothing in the complaint or the amended complaint, moreover, even remotely approaches the "hard evidence" of "serious and irreversible mental or physical damage" that the *Komninos* Court requires to circumvent the mandated administrative process.

III. The Petitioners could not have maintained a state law cause of action for "harassment" or "intentional infliction of emotional distress," and the district court properly dismissed this aspect of the case along with the federal causes of action.

The lower court had discretion, under 28 U.S.C. § 1367, to exercise supplemental jurisdiction over the Petitioners' state law claims. The Supreme Court in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966), however, cautioned that "if federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." The pretrial dismissal of the federal claims raised by the Petitioners against the Respondents thus weakened substantially the jurisdictional basis for retaining the state-law claims. Even if the state-law claims had remained after dismissal of the federal claims, they would have been barred by application of the Political Subdivision Tort Claims Act (the "Tort Claims Act"). 42 Pa. C.S.A. § 8541 *et seq.* The Torts Claims Act was enacted five years after the Pennsylvania Supreme Court abrogated the judicially created doctrine of governmental immunity in *Ayala v. Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877 (1973). With the exception of eight areas of activity, the Act reinstates the general grant of immunity to all local agencies for damages caused by acts of an agency or its employees. A school district is a "local agency" which is protected by the immunity of the Act. 42 Pa. C.S.A. § 8501; *see also Vince by Vince v. Ringgold School Distr.*, 92 Pa. Cmwlth. 598, 600, 499 A.2d 1148, 1149 (1985).

In construing the Act, Pennsylvania courts have repeatedly held that local agencies are immune from suit for such claims as assault and battery, *see Cottier by Cottier v. School District of Philadelphia*, 128 Pa. Cmwlth. 159, 562

A.2d 1029 (1989); *Clark v. SEPTA*, ___ Pa. Cmwlth. ___, 691 A.2d 988 (1997); invasion of privacy, *see Piccariello v. Com.*, 54 Pa. Cmwlth. 252, 421 A.2d 477 (1980); negligence, *see Weissman v. City of Philadelphia*, 99 Pa. Cmwlth. 403, 513 A.2d 571 (1986); *City of Philadelphia v. Glim*, 149 Pa. Cmwlth. 491, 613 A.2d 613 (1992); and violations of the Pennsylvania Constitution. *See Creighton v. Schuykill County*, 882 F. Supp. 411, 416 (E.D. Pa. 1995). Most pertinent, however, is the universal recognition among Pennsylvania state and federal courts that the Act establishes immunity from claims for intentional infliction of emotional distress, *see Zernhelt v. Leigh County Office of C & Y Services*, ___ Pa. Cmwlth. ___, ___, 659 A.2d 89, 90 (1995); *Purdy v. Romeo*, 149 Pa. Cmwlth. 281, 613 A.2d 91 (1992); *Kessler v. Monsour*, 865 F. Supp. 234, 241 (M.D. Pa. 1994); *Collier by Collier v. William Penn School District*, 956 F. Supp. 1209, 1216 (E.D. Pa. 1997). State and federal courts in Pennsylvania have also held that governmental immunity under the Tort Claims Act bars claims of intentional infliction of emotional distress against a local agency. *See, e.g., Moser v. Bascelli*, 865 F. Supp. 249, 253 (E.D. Pa. 1994) (local police department and township immune from claim of intentional infliction of emotional distress); *Kessler v. Monsour*, 865 F. Supp. 234, 241 (M.D. Pa. 1994) (defendant school district immune from teacher's suit for intentional infliction of emotional distress); *Verde v. City of Philadelphia*, 862 F. Supp. 1329, 1336-1337 (E.D. Pa. 1994) (city immune from real estate clerk's claim of intentional infliction of emotional distress).

IV. The Killinos could not have sustained an action based upon unsubstantiated claims that Respondents maintained a "policy, practice, or custom" that deprived the Killinos of nothing.

The Petitioners contend that their Section 1983 claims should have survived the Respondents' motion for summary judgment. Count V of their amended complaint did not add anything to the common core of operative fact that underlies the other Counts of the amended complaint, and the Killinos nowhere suggest that the Section 1983 claims have viability independent of the other Counts. Merely offering the bald statement that the District has a "policy, practice, or custom" of serving students without an evaluation – without any substantiation in the form of affidavits or other evidence – does not raise material facts sufficient to defeat the entry of judgment in favor of defendants. *See* Rule 56(e). Even if the Killinos' say-so were taken at face value by the Court, the theory of liability upon which the Section 1983 count is premised is somewhat unclear. If the District *does* maintain a "policy, practice, or custom" of treating some students as having a disability without conducting the legally-mandated preplacement evaluation, and if the District is therefore seeking to deviate from that policy and adhere to the law in this case, the Killinos fail to make even remotely clear the nature of the illegal discrimination *the Killinos* have suffered or right of *the Killinos* that the District has violated in doing so. Of course, in a "policy, practice, or custom" case under Section 1983, "there must be an affirmative link between the policy and the particular constitutional [or federal statutory] violation alleged." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985); *see also Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990) (same). In this case, an "affirmative link" between the alleged policy of treating students as disabled without an

evaluation and the "harm" suffered by plaintiff Meredith Killino cannot exist because the District's apparent *refusal* to apply this alleged illegal policy to Meredith is the very "wrong" of which the Killinos complain. The Killinos, in other words, appear to be complaining that the District acted illegally in refusing to act illegally by treating Meredith as handicapped without an evaluation.

CONCLUSION

The Riverside School District, Dr. John F. Rooney, John Helcoski, Dennis Kryzanowski, Janet Kresge, Deborah Kaplan, John Voytko, and Joseph Moceyunas respectfully request that, since the Court of Appeals did not violate the standards established for granting a motion for summary judgment, this Court deny the Writ of Certiorari in this matter.

Respectfully submitted,

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Counsel for Respondents

Dated: March 16, 2000

APPENDIX

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

MEREDITH KILLINO
Date of Birth: 7/19/79
Dates of Hearing: 7/1/92, 7/30/92, 9/22/92, 10/5/92
CLOSED HEARING

Parties to the Hearing

Mr. & Mrs. Thomas Killino
725 Oak Street
Taylor, Pa. 18517

Riverside School District
Northeastern Educational
Intermediate Unit #19

Date Transcirpt Received: 10/12/92
Date of Decision: 10/23/92

Andrew M. Klein, Hearing Officer

II. BACKGROUND:

Meredith Killino is a 13 year old student in the Riverside School District. She is presently in a regular education, eighth grade classroom program. The district has requested this hearing because it wishes to conduct a comprehensive evaluation of Meredith to determine whether she is either exceptional under the Chapter 14 Regulations or a protected handicapped student under the Chapter 15 Regulations.

For their part, the parents believe that Meredith has been evaluated by the district while in seventh grade over the course of the 1991-92 school year. The need for ongoing and further evaluations is not necessary as enough data exists to be able to write a service agreement

under Chapter 15 immediately at this time. This service agreement would develop the adaptations, accommodations and modifications required for Meredith in regular education as well as an inservice training program for the faculty and staff.

At the second session of the hearing an agreement was struck between the parties and memorialized as an attachment to this decision. Within three weeks, the parents contacted the Right to Education Office indicating that they wished to reopen the hearing and continue the proceedings to their conclusion. The reasoning for this was the school district's unilateral decision to move Meredith from the top section in her grade to a lower section just prior to the beginning of the school year. Counsel for the family requested the hearing to be reopened in a letter of September 4, 1992 to the Hearing Officer and the hearing was reopened on September 22, 1992. The reader is referred to notes of transcript 216-222 for further detail.

In this case, both parties submitted exhibits which were duplicative in nature. These are noted both as school and parent exhibits in the Findings of Fact as noted below. In addition, an extension of time of five (5) days was granted by the parties to the Hearing Officer.

III. FINDINGS OF FACT:

1. Meredith Killino is a 13 year old girl who is in regular education. She has been a student in the Riverside School District [hereafter District] since September of 1984 (S1, S12, S13).

2. Meredith was evaluated in first grade for possible inclusion in special education via the multidisciplinary evaluation [MDE] process due to learning difficulties. She was found to be non-exceptional at that time (NT 27-28, 30-31; S5, S6, S7, S8, S9, S10, P2)

3. She received Chapter I reading services in second grade (NT 29; S11).

4. Meredith progressed appropriately through her elementary grades demonstrating reasonable acquisition of learning skills and retention of learned material (NT 29, 338, 454-455, 458-459; S18).

5. She was placed in the top section in sixth grade for the 1990-1991 school year (NT 31-32, 459).

6. She required remediation in mathematics and reading in sixth grade due to her failure of the Testing for Essential Learning and Literary Skills [TELLS] tests and was tutored by her father in sixth grade (NT 32-33, 460; S15).

7. Meredith exited the TELLS program in April, 1991 by virtue of passing the necessary tests (NT 33, 145; S16, S17).

8. She left grade six with an overall A-plus grade average and was placed in the top section for grade seven (NT33-34, 338, 461-462; S12, S18).

9. Meredith began manifesting learning and emotional problems within the first month of school in seventh grade as reported by

her teachers and parent observations (NT 34-35, 349-350, 462, 536; S21).

10. An Intermediate Unit psychologist assigned to the District, Mr. Giles, observed Meredith in class during October of 1991 after being contacted directly by the parent. He received permission to conduct these observations and, in addition, reviewed teacher reports which were provided to him and conducted some teacher interviews. No summation of his work was ever developed (NT 36, 89-90, 158, 230-231, 357).

11. Subsequent to Mr. Giles' involvement, the District recommended that Meredith be moved to a lower section of seventh grade which the parents refused (NT 37-39, 43, 119, 158, 362-364, 466-467).

12. The parents wrote to the District demanding that Mr. Giles have no further contact with Meredith (NT 39, 471; S22).

13. An Intermediate Unit psychologist who had been previously assigned to the District, a Mr. Sinco, spoke with and observed Meredith in December of 1991 for approximately 45 minutes which did result in a summation consultation report (NT 40, 365-366; S23, P5).

14. In January, 1992, the District received a note from a pediatric neurologist, Dr. Lilik, indicating that Meredith is suffering from Attention Deficit Disorder [ADD]. Generic suggestions for the parent and District were attached to this note (NT 41-42; S24, P8).

15. Dr. Lilik has continued to follow Meredith since his initial examination on 12/27/91 (P7, P27, P30).

16. Meredith was placed on the prescription medication Ritalin by Dr. Lilik and continues on this same medication until today (NT 44, 392).

17. The District delayed a complete psychological evaluation based upon Dr. Lilik's statements to the District and the parent to wait until Meredith's medication had been adjusted accordingly (NT 46, 131; S26).

18. The parents requested adaptations to be carried out in regular education which were complied with by the District in a fragmented fashion at best (NT 42-43, 51-54, 67-71, 121, 123, 502, 505, 553, 555; S25, S29, S35; P1, P4, P9, P10, P11, P13, P16, P17, P18, P19, P20).

19. The parents filed a complaint with the Office of Civil Rights [OCR] in March, 1992 alleging discrimination by the District on the basis of Meredith's ADD (NT 509; P12, P25, P26).

20. The parents filed a complaint with the Bureau of Special Education [BSE] on 3/23/92. A Complaint Closure Report issued on 6/23/92 found no corrective action was needed due to the District's compliance at that time pursuant to the Chapter 15 Regulations (S38, P14, P21).

21. On May 13, 1992, the District issued a Consent for Evaluation in order to perform a variety of assessments which the parent

refused to sign (NT 57-59, 524; S27; P28, P29).

22. Shortly thereafter, on 5/18/92, the parents filed an action in Federal Court against the District alleging a failure to comply with federal regulations regarding ADD children in the District generally and Meredith specifically, thus violating her civil rights (NT 59; S28).

23. Meredith struggled throughout seventh grade in most subject areas and fell from an "A-plus" sixth grader to a "D" seventh grader for the most part (S36).

24. Certain adaptations by certain instructors did result in improved grades during the second semester (NT 395-397; S36).

25. The parents have desired a service agreement under the Chapter 15 Regulations since March of 1992 (NT 416, 507, 554; P13).

26. Those in attendance at this hearing who presented relevant testimony are as follows:

For Parents:

Thomas Killino, Father
Joan Killino, Mother
Frank Muraca, Parents' Attorney

For District:

Jack Helcoski, Supervisor of Pupil Services
Jerome Giles, Intermediate Unit Psychologist
Dennis Kryzanowski, School Principal

Andrew Faust, Special Counsel
Rosemary Mullaly, Special Counsel

27. Those in attendance but not presenting relevant testimony:

Ken Barnansky, Guidance Counselor
John Rooney, Superintendent
Michael Theriault, Observer
Phillis Theriault, Observer
Anne Marie Ermolovich, Reading Teacher

IV. ISSUES:

1. In light of Meredith's performance in school, is the District's request for evaluation and testing a reasonable educational procedure?

2. If so, are the proposed tests needed in order to measure whether Meredith might be exceptional or a protected handicapped child?

V. DISCUSSION AND CONCLUSIONS OF LAW:

At the outset, I feel compelled to comment upon the extreme animus which exists between the parties. This was referenced numerous times in the record and is quickly gleaned from a review of the exhibits. A process for helping a child with ADD has gone from the desired collaborative, cooperative affair which should be engaged in between parents and school districts to one of contention and adversarial positions which can only portend grave educational consequences for Meredith over the next few years.

Neither side should feel as if it has conducted itself in a mature and adult-like manner. On July 30, 1992 an agreement was struck between the parties after long and hard efforts that evening. I took them to be sincere. Yet, within three weeks or so, the District unilaterally changed Meredith from her top section in seventh grade to a lower section for the upcoming eighth grade school year. It is virtually inconceivable to me that this plan was not contemplated by the District on the night that we were working so conscientiously on an agreement to benefit Meredith. When the parent alleges bad faith, I cannot help but tend to agree with them.

Nor should the parent rejoice in the above rebuke. Their demanding and confrontational approaches with the school district administration and staff have created a level of hostility which may be nearly impossible to ameliorate. I cannot help but wonder if the parents are advocating for their daughter or embarking upon a vendetta against the school district.

With the above reproofs in place, I now turn to the substantive issues at hand.

In a pre-evaluation hearing, the District's burden is to show that the child's school performance is such that the student may be exceptional and in need of special education and needs to be evaluated by the types of tests the District has proposed. The question before me is whether the evidence supports the District's request and represents a reasonable educational procedure. A reasonable educational procedure has been defined as a proposed test or examination that is necessary in order to

determine if the child needs some form of special education.

The Federal Regulations implementing the Individuals With Disabilities Education Act [IDEA] and the Regulations and Standards implementing the Pennsylvania Statutes as apply to special education closely parallel one another. The entire regulatory and statutory frameworks are based upon the need to collect adequate data so as to assess a child who may be in need of special education in a structured, systematic and hierarchical manner.

The Pennsylvania Regulations at § 14.1 define the screening and evaluation process as "the systematic determination of the nature of a student's . . . need for special education . . . , including supplementary aids and services, . . . ". At § 14.25 (c)(4) the Regulations indicate that "a multidisciplinary evaluation shall be initiated if . . . : the student has a sensory impairment or physical or mental disability so severe that supplementary aids and services available without the multidisciplinary evaluation will not sufficiently assist the student to receive an appropriate education." This particular section of the Regulations goes on to describe how the MDE needs to be formed on the basis of a student's needs and involve individuals who are familiar with the student's educational experience and performance, the parents, persons knowledgeable in the areas of suspected exceptionality and the like. The MDE needs to be "sufficient in scope and depth to investigate all information relevant to the student's suspected exceptionality, including academic functioning, adaptive behavior, social behavior, learning problems, learning strengths and educational needs and information . . . " § 14.25 (g).

Turning now to the Standards for special education at § 342.25 (a)(2), we note: "Referral for multidisciplinary evaluation is indicated when the student is suspected of being exceptional and one or more of the following exists: the instructional assessment of the student experiencing academic difficulty indicates a performance level which is not sufficient to demonstrate success in the regular class without the addition of supplementary aids or services, or both."

In the extant case, Meredith is a student who had been performing at exceptionally high levels in her upper elementary grades, especially fifth and sixth grades. She was a student who was placed in the top sections and was making remarkable progress in elementary school. She moved on to seventh grade and within the first two to three weeks in the top section began to experience academic problems as well as a diminution of her self-esteem. This was noted universally by her parents and educators alike. To date, in the eighth grade, and in a lower section, she appears to be functioning adequately but it is much too soon to be able to predict success or failure as a result of her being moved down academically by two sections.

What is unfortunate is the inconsistent and incomplete approach by the District to moving towards an MDE. While many defenses can be erected to explain how a student manifesting early difficulties in late September and early October was not moved more quickly to an evaluation process (which the parents were asking for and agreeing to), it is indisputable that it was not until May 13, 1992 that a consent to evaluate was finally delivered to the family. An entire school year had been wasted

educationally for Meredith with attendant educational suffering on her part.

What is also incontrovertible is that Meredith's grades continued to remain at the "D" level for much of the school year though some improvements were noted in Life Science and Music during the second semester. The parents would have us believe that it was because these two teachers employed adaptations in a conscientious manner in the classroom. While that may be so, Meredith struggled mightily throughout the entire year.

The parents request that the District be ordered to move immediately to a service agreement under Chapter 15. Further, they assert that enough data has been gathered through Dr. Sinco's short time in December with Meredith as well as all of the reports of the teachers that have been gathered over the course of the 1991-92 school year. I must disagree and will not elevate form over substance. The summation consultation report of Dr. Sinco does not come close to the mark in terms of the requirements of evaluation as laid out in Chapters 14 and 342. While the teacher evaluations and comments joined with grades would be extremely helpful and useful, in and of themselves, they are not sufficient to be able to conduct an expert multidisciplinary evaluation. The parents would argue that the reports which are now available from Dr. Lilik are sufficient medically to confirm a diagnosis of ADD and his suggestions are enough for the District to move forward to writing a service agreement. While I do not quibble with the fact that Dr. Lilik's evaluation is sufficient to provide a diagnosis of ADD, again, it is not enough in terms of driving an educational program for Meredith or any other ADD student. In the

case of *Dubois v. Connecticut State Board of Education*, 727 F 2d 44 (2d Cir. 1984) the court ruled that before a school system becomes liable under the Act for special education placement of a student, it is entitled to up-to-date evaluative data. The evaluative data provided thus far, while adequate medically and educationally from the teachers, is lacking in the areas of intellectual and cognitive assessments. Such assessments have not been conducted since 1985 and need to be updated today.

An MDE requires consideration of test results and these test results must be comprehensive, multi-perspective and scientific [this was illustrated in the case of *Bonadonna v. Cooperman*, 619 F. Supp. 401 (D.N.J. 1985)]. An assessment of a child also must be performed in every area that may be related to the suspected disability and the district must rely on a variety of tests and/or evaluations interpreted in an MDE by properly certificated personnel who are expert in their fields.

To ask now for the District to move to a service agreement without the benefit of an MDE to diagnosis any possible disabilities which have arisen as the result of Meredith's ADD flies in the face of reason. Recently, in the case of *Hacienda La Puente Unified School District v. Honig* (91-55757), the 9th Circuit Court of Appeals held that "in enacting the IDEA, Congress specifically recognized that undetected disabilities prevent many children from having a successful educational experience". This Court went so far as to say that all disabled students, even previously unidentified ones, are entitled to the procedural safeguards of IDEA. In Meredith's situation, where ADD is a confirmed diagnosis, not to afford her

the benefits of a full evaluation to uncover possible disabilities that may need and would respond to remedial efforts would violate the spirit and the intent of the law.

We now turn to the particular types of evaluations the District wishes to conduct. Based upon the above reasonings, we are in agreement that academic achievement tests coupled with intellectual and cognitive development tests need to be performed. I am also convinced that scales which have been developed to assess ADD need to be administered in Meredith's case as well. I am unconvinced that another pediatric neurological workup needs to be ordered in this matter. Dr. Lilik is a highly regarded pediatric neurologist in Northeastern Pennsylvania and the exhibits submitted indicate for me preponderantly that he has completed a thorough medical evaluation and workup. What will be critical is for Dr. Lilik to be part of a multidisciplinary evaluative process so that he can share his findings and his thoughts with the entire team.

During the course of the proceedings, testimony was received that the District had been in consultation with the Intermediate Unit regarding a third psychologist to be involved with Meredith if such an evaluation was to occur. I concur with that approach and believe that a psychologist uninvolved to date with the Riverside School District or Meredith's case should conduct this evaluation.

The very real possibility exists that Meredith very well may not qualify as an exceptional student under the requirements of the IDEA or the Pennsylvania Regulations. Should this occur, it will be imperative for the

District to utilize the available information to consider Meredith as a protected handicapped student under Chapter 15 and Section 504 of the Rehabilitation Act of 1973. She does suffer from ADD and this medical condition may require a service agreement under Chapter 15 of the Regulations.

Therefore, the District has sustained its burden of proof that Meredith Killino requires a multidisciplinary evaluation including a complete psychological assessment and battery of tests. The District will need to consider the information of Dr. Lilik rather than obtaining its own independent pediatric neurological examination. The parents have failed to establish that enough evaluative material is present in this case to proceed directly to a service agreement for Meredith without benefit of an MDE process.

Accordingly, we make the following:

VI. ORDER:

It is hereby ordered that:

1. The District shall contact the local Intermediate Unit to provide a psychologist who is unfamiliar with Meredith's case and has never worked previously in the Riverside School District.

2. The psychologist so obtained shall conduct an individual evaluation of Meredith which assesses academic achievement, intellectual and cognitive development as well as administration of scales that have been developed for evaluating children with ADD.

3. Anecdotal reports of Meredith's functioning shall be obtained from each and every one of her instructors to whom she is assigned during this eighth grade year.

4. The evaluations and examinations of Dr. Lilik shall suffice in this matter for the medical assessment portion of this process.

5. A multidisciplinary evaluation shall be conducted in accordance with Sections 14.25 and 342.25 of the Pennsylvania Regulations and Standards.

6. If Meredith does not qualify as an exceptional student requiring an Individualized Education Plan [IEP] under the requirements of special education, she shall be evaluated immediately as a protected handicapped student under Chapter 15 of the Pennsylvania Regulations and Section 504 of the Rehabilitation Act of 1973. Should she be found to qualify under these statutes, a service agreement shall be developed in accordance with Chapter 15 of the Pennsylvania Regulations.

/s/ Andrew M. Klein
Andrew M. Klein,
Hearing Officer

October 23, 1992

IN THE SPECIAL EDUCATION DUE PROCESS APPEALS REVIEW PANEL COMMONWEALTH OF PENNSYLVANIA

IN RE: THE EDUCATIONAL ASSIGNMENT OF MEREDITH K., A STUDENT IN THE RIVERSIDE SCHOOL DISTRICT	:	SPECIAL EDUCATION OPINION NO. 583

BEFORE SPECIAL EDUCATION APPEALS PANEL OFFICERS SELKOWITZ, ACKERMAN AND BELLUCCI

OPINION BY BELLUCCI, APPELLATE OFFICER

I. BACKGROUND

This is an appeal filed by Meredith K. of the decision of the Hearing Officer dated October 23, 1992. Meredith K. is a 13 year old student in the Riverside School District. She is presently in a regular education, eighth grade classroom program. The district has requested this hearing because it wishes to conduct a comprehensive evaluation of Meredith to determine whether she is either exceptional under the Chapter 14 Regulations or a protected handicapped student under the Chapter 15 Regulations, 22 Pa. Code Chapters 14-15.

The parents believe that Meredith was evaluated by the district while in seventh grade during the 1991-92 school year; and that the need for ongoing and further evaluations is not necessary as sufficient data currently exists to write a service agreement under Chapter 15. This service

agreement would develop the adaptations, accommodations and modifications required for Meredith in regular education as well as an inservice training program for the faculty and staff.

This Due Process Hearing consisted of four sessions. At the second session of this hearing an agreement was struck between the parties and memorialized as an attachment to the decision. Within three weeks, the parents contacted the Right to Education Office indicating that they wished to reopen the hearing and continue the proceedings to conclusion. The reasoning for this was the school district's unilateral decision to move Meredith from the top section in her eighth grade class to a lower section just prior to the beginning of the school year. Counsel for the parents requested the hearing to be reopened in a letter of September 4, 1992 to the Hearing Officer and the hearing was reopened on September 22, 1992. The decision was rendered on October 23, 1992. On November 6, 1992 the parents filed 27 exceptions to the Hearing Officer's Decision. The Riverside School District answered the exceptions filed on November 16, 1992. Additionally, the School District excepted to one portion of the Hearing Officer's order, the part that denied the District's request for a neurological evaluation. This panel has now reviewed the matter.

II. ISSUES PRESENTED

The issues presented are: (1) based on Meredith K's performance in school, is the School District's request for an evaluation a reasonable educational procedure? (2) are

the proposed tests required to determine whether Meredith might be an exceptional child and eligible for special education services?

III. DISCUSSION

This panel believes that the twenty-seven specific exceptions by the parents and the lone exception of the School District need not be addressed seriatim, but may be discussed wholly as a general exception.

The general objection to the decision is that the Hearing Officer erred in his conclusions and findings of fact. The parents felt that the conclusions and findings of fact were not supported by the evidence presented at the hearing, and that the Hearing Officer's decision should be reversed.

Our review of the record indicates that the findings of the Hearing Officer are well supported in the record and should not be disturbed. See *Conrad Weiser Area School District v. Department of Education,* 603 A.2d 701 Pa Commw Ct 1992). Pre-evaluation hearings are conducted prior to the initial individual evaluation. Prior to initial individual evaluation the school must notify the parents of the child of its intent to evaluate the child. If the parents of the child refuse to consent to the initial individual evaluation the school district **must** request a Due Process Hearing. 22 Pa. Code § 14.25(e). This is precisely what happened in the Meredith K. case.

The question which the hearing officer must resolve is whether or not the proposed testing and evaluations are a

reasonable procedure in view of the child's school conduct and/or academic performance. At this time the district does not have to show that the child is exceptional, only that the child's school performance is such that the child may be diagnosed as exceptional and in need of specially designed, education. Additionally, the district must justify that the proposed tests are needed to measure or contribute to the measurement of the child's exceptionality. Unlike program placement hearings, the hearing officer's responsibilities at pre-evaluation hearings are limited to ruling upon the testing procedures that the district has proposed. Therefore, the Hearing Officer was correct in not allowing the parents to call all of the seventh grade teachers to testifly about the inservice training they received regarding Project Adapt and the specific adaptions that they were making in their classrooms to accommodate Meredith's ADD problems. The follow-through of an evaluation done on Meredith in first grade is also irrelevant to the current evaluation issue and there was no reason for the Hearing Officer to consider it other than to provide general background information. The fact that Meredith was eligible to receive Chapter 1 reading services and was tutored by her father is also irrelevant to the current issue of whether she needs an individual evaluation and what testing instruments are necessary. The parent's attorney also excepted to a number of issues that would not affect the decision or were also irrelevant to this case. If the parent's attorney wished to question Meredith's teachers regarding their observations and evaluations of her, this would have been permissible but to question them about adaptions they made in Meredith's instruction, or how

much they know about Project Adapt, was irrelevant. Additionally, prior to any service agreement or IEP an evaluation is necessary in order to make the appropriate placement and programming decision.

Prior to further discussion, a definition of and an understanding of what an evaluation entails is necessary. An evaluation is not merely a test. It is a process that involves the collection of meaningful information to understand and help individuals cope with problems. A test is only one part of this process. The evaluation of a child is based on information obtained from a variety of sources. These include records and reports; interviews with parents, physicians, teachers, and the child; observations of the child, standardized tests; and other special procedures. Standardized tests provide a means of observing and assessing abilities in a systematic way. On the basis of what is observed on tests, results are reported and inferences are made. Since the test stimuli and scoring procedures are standardized, norms can be established. The usual steps in the evaluation process are as follows:

1. Review referral information. Any material that is not clear should be checked with the referral source (e.g., physician, teacher, parent, or psychologist).

2. Interview parent. Obtain information relevant to developmental, health, familial, and environmental factors that may be pertinent to the child's problem.

3. Obtain information from other agencies, including previous psychological assessment.

4. Obtain current medical assessment.

5. Observe child in various settings, if at all possible.

6. Perform psychological assessment.

7. Conduct interdisciplinary staff conference and meetings with the parents after all materials have been obtained (this includes MDE, MDT, and IEP meetings).

These steps will result in the following kinds of information: (a) *developmental* (including information about cognitive and perceptual achievement, social abilities and skills, adaptive behavior, and emotional and personality characteristics); (b) *behavioral* (including observations from the test situation, school, and family); (c) *medical* (including neurological work-up); and (d) *environmental* (including information about school and family). The information will be used to describe the problem, to estimate its severity, to identify factors related to the problem, to suggest areas for improvement, and to help develop treatment or remediation suggestions Jerome M. Stattler, *Assessment of Childrens Intelligence and Special Abilities*, at 329 (1982).

This is not what has transpired to date in the Meredith K. case. The evaluation reports of the teachers, the diagnosis by Dr L. that Meredith is ADD, the observations by psychologists Michael S. and Jerome G. are part of the evaluation process but do not provide a complete picture, which is required for the MDE and IEP team meetings to draw conclusions and design an appropriate educational program to meet Meredith's needs. Dr. L's two page list of adaptions are generic. The recent evaluation by

Michael S. is of insufficient detail to be of use. Jerome G.'s recommendations were premature considering the limited amount of time he spent observing, but not testing, Meredith. An IEP means "specially designed instruction . . . to meet the *unique* needs of a child with a disability." Thus, each child with a disability must be provided with an *'individualized* education program' (IEP) which contains a statement of the specific educational services to be provided to the child in order to meet his or her unique individual learning style and needs. To be specific, the special education program is based upon individual learning needs, not the handicapping condition of the child. Based upon the evidence presented at the hearing, a complete evaluation is still required in order to develop an appropriate education program for Meredith. Meredith's father did give permission for the classroom observations as part of the "pre-evaluation" process. This panel does not believe that the school district needs parental permission to make preliminary observations of a child in the classroom setting by a counselor or psychologist in order to determine whether a complete individual assessment is necessary.

A thorough evaluation is required before a school district may place a student in special education or provide services under Section 504. The following quotations with regard to IDEA and Section 504 are set forth in a Joint Memorandum issued by the U.S. Dept. of Education:

18 IDELR 116 (1991):

> IDEA – State education agencies and local school districts have an affirmative obligation to evaluate any child, suspected of having ADD/ ADHD, who meets eligibility criteria. A local

> school district may not refuse to evaluate a child because of a prior medical diagnosis of ADD, but a medical diagnosis alone is not sufficient to qualify a child as eligible for special education and related services. (Joint Memorandum, 18 IDELR 116 (1991).
>
> Section *504* – Local school districts are obligated to evaluate any child suspected of being handicapped under Section 504 (including children who are suspected of having ADD/ADHD which "substantially limits" their ability to learn) in the following circumstances: 1) before an initial placement in regular or special education, and 2) before any subsequent significant change in placement. (34 C.F.R 104.35).

This does not mean that a student must be subjected to repeated evaluations of the same type. Schools do not have to consult physicians when outlining special education services for children with attention deficit disorder (ADD). The multidisciplinary team a school convenes to design an individualized education program (IEP) for an ADD student must include someone with specific knowledge of how to identify and treat the disorder. Since a diagnosis of ADD has already been made by Dr. L., another neurological examination will not be required but the School District must have a knowledgeable person available with specific information regarding the use of appropriate adaptations and interventions for programming students with ADD.

Finally, it appears that both the parents and the School District have ignored or have forgotten the intent of IDEA, Section 504, and Chapters 14 and 15; that is to provide a appropriate education that is specifically

designed to meet the unique needs of the child. The contentious and adversarial relationship between the parents and School District has caused Meredith to suffer through a disastrous seventh grade, and she is well on her way to having the same occur in eighth grade.

IV. ORDER

AND NOW, this 10th day of December, 1992, it is hereby ordered that:

1. the findings of fact and recommended Order of the Hearing Officer be adopted in their entirety, and that the parent's and School District exceptions are dismissed.

2. the MDT must have a knowledgeable person available with specific information regarding the use of appropriate adaptations and interventions for programming students with ADD.

In accordance with 22 Pa Code Sec. 14.64(m), the parties are advised that this matter may be appealed to the Commonwealth Court of Pennsylvania or to the appropriate federal district court.

/s/ Joseph T. Bellucci
Joseph T. Bellucci,
for the Appeal Panel

Signature date: 12/10/92

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

Child's Name: Meredith Killino
Date of Birth: July 19, 1979
Dates of Hearing: March 16, 1995; April 10, 1995; July 7, 1995; August 21, 1995

Type of Hearing: CLOSED

Parties to the Hearing:

Mr. and Mrs. Tom Killino
725 Oak Street
Taylor, PA 18517

Riverside School District

Date Transcript Received:
August 28, 1995

Date of Decision:
September 25, 1995

Hearing Officer Name:
Gregory J. Smith

Hearing Officer Signature: /s/ Gregory J. Smith

NOTE: By agreement of the parties, this decision has been rendered within 15 days of receipt of post-hearing briefs from both parties. The post-hearing brief from the District was received on September 9, 1995. The post-hearing brief from the parents was received on September 21, 1995.

PROCEDURE TO APPEAL THE DECISION OF HEARING OFFICER

A Hearing Officer's decision comprises Findings of Fact made by the Hearing Officer and an order which the Hearing Officer believes the Panel of three Appellate Hearing Officers should affirm.

The decision of the Hearing Officer may be appealed to a Panel of three Appellate Hearing Officers by the parent, guardian, surrogate parent, or school district. 22 PA CODE § 14.64(m). An appeal from a decision of a Hearing Officer solely on a Section 504/Chapter 15 issue is not made to the Appeals Panel, but is filed directly with a court of competent jurisdiction. 22 PA CODE § 15.8(d). The General Rules of Administrative Practice and Procedure of 1 PA CODE § 31.1 et seq.; 1 PA CODE § 35.1 et seq. are applicable to proceedings before the Appeals Panel 22 PA CODE § 1.6. Therefore, in order to appeal a Hearing Officers decision, one of the above mentioned parties must file exceptions (objections) to the Hearing Officer's decision with Counsel, Right to Education Office.

A. EXCEPTIONS

All exceptions to the decision must be as specific and as simply stated as possible. The excepting party may also file a legal brief in support of the exceptions in conformance with 1 PA CODE § 35.212. Filing of a brief is not necessary for the submission of exceptions to the Panel. Following is the process and the general guidelines governing the filing of exceptions:

1. Exception(s) to the Hearing Officer's decision and any accompanying brief which a party may wish to file with the Panel should be sent to:

   Counsel
   Right to Education Office
   6340 Flank Drive, Suite 600
   Harrisburg, PA 17112

2. Exceptions and briefs must be received by Counsel, Right to Education Office no later than **15 days** after the excepting party's receipt of the Hearing Officer's decision. It is the date the exceptions are received rather than the date the exceptions are sent that determines the 15 day time limit. 1 PA CODE § 31.11.

3. A copy of the exceptions and brief **must** be sent to the opposing party and his/her representative.

B. ANSWERS TO EXCEPTIONS

The opposing party may file answers to the exceptions. The answers must be received by Counsel, Right to Education Office, within **10 days** of the time the exceptions were received. I PA CODE § 31.11. A copy of the answers **must** be sent to the party who filed the appeal.

C. EXTENSION OF TIME FOR FILINGS

Extensions of time for filing of exceptions or answers may be granted for good cause. I PA CODE § 31.15. If granted, the extension will be given for a specific amount of time, e.g., 1 week. A request for a specific extension of time must be submitted prior to the expiration of the time for appeal or answer.

Background

Meredith Killino is a 16-year, 2-month-old student in the Riverside School District (District). Meredith has been

diagnosed by a pediatric neurologist as suffering from Attention Deficit Disorder. In the spring of 1992 the District requested a hearing in order to evaluate Meredith to determine whether or not she is exceptional under 22 Pa Code § 14 or a protected handicapped student under 22 Pa Code § 15. On October 23, 1992 a decision was rendered ordering the District to complete evaluations of Meredith. On February 14, 1994 and March 7, 1994 Meredith forgot her gym clothes and did not participate in her physical education class. As the result of her failure to participate in physical education, Meredith was required to complete 25 laps for each day that she did not participate. On February 3, 1995 Meredith's parents requested the present Due Process Hearing alleging that the requirement to complete laps was an act of discrimination on the part of the District.

Findings of Fact

1. Meredith Killino is a 16-year, 2-month-old (d.o.b. July 19, 1979) student in the Riverside School District (District). (P-5, P-6, S-1)

2. Meredith began manifesting learning and emotional problems in seventh grade (the 1991-1992 school year). (S-1)

3. In January 1992 the District received notice from a pediatric neurologist indicating that Meredith suffered from Attention Deficit Disorder. (S-1)

4. In the spring of 1992 the District requested a hearing to obtain an order to allow it to evaluate Meredith to determine whether she is exceptional under 22 Pa Code § 14 or a protected handicapped student under 22 Pa Code § 15. (S-1)

5. On October 23, 1992 a decision was rendered ordering the District to complete evaluations of Meredith. (N.T. at 73-74; S-1)

6. That decision was appealed by Mr. and Mrs. Killino, Meredith's parents, and the decision was upheld on December 12, 1992. (N.T. at 74-75; S-2)

7. In January 1993, Meredith's parents appealed that ruling by amending an action that had previously been filed in federal court. That action was dismissed on September 3, 1993. (N.T. at 717-721; S-3)

8. On October 22, 1993 the District commenced the evaluation process. (N.T. at 84; S-4)

9. On February 14, 1994 and March 7, 1994 Meredith forgot her gym clothes and did not participate in her physical education class. (N.T. at 151, 215, 668; P-10, S-9)

10. Meredith was required to complete 25 laps for each day that she did not participate in physical education. (N.T. at 215, 232-233; P-10, S-9)

11. Meredith's parents filed a complaint in the United States District Court for the Middle District of Pennsylvania in which they alleged that the requirement to complete 25 laps was discriminatory punishment and in which they sought declaratory and injunctive relief against the Riverside School District, John F. Rooney, Superintendent of Schools, and physical education teachers Janet Kresge and Deborah Kapelan. (S-14)

12. That action was dismissed on January 3, 1995 for failure to exhaust administrative remedies. (S-14)

13. On February 3, 1995 Meredith's parents requested the present Due Process Hearing. (P-14, S-15)

14. Those in attendance at the hearing were as follows:

For Parent:

Mrs. Joan Killino – parent
Mr. Tom Killino – parent
Patricia Amato – nurse
Anne Marie Kurilla – paralegal
Frank Muraca, Esq. – attorney

For District:

Lawrence Bilardi – school psychologist
Jack Helcoski – Supervisor of Pupil Services
Janet Kresge – teacher
Dennis Kryzanowski – principal
Dorris Pliss – school nurse
Dr. John Rooney – Superintendent
Andrew Faust, Esq. – attorney

Issue

Did the Riverside School District discriminate against Meredith Killino?

Discussion and Conclusions of Law

The single issue that was brought before this Hearing Officer was: Did the Riverside School District (District) discriminate against Meredith Killino? At the hearing Mr. and Mrs. Killino, Meredith's parents, made four specific claims of discrimination: One, the District punished Meredith for forgetting her gym clothes on February 14, 1994 and March 7, 1994 and that the punishment was discriminatory because the forgetting was a manifestation of her attention deficit disorder. Two, the punishment employed, running 50 laps, was discriminatory because of Meredith's tachycardia, a side effect of her medication

for attention deficit disorder. Three, the unsatisfactory grade Meredith received in that course was discriminatory because it was directly related to the incident of forgetting her gym clothes and, as stated above, the parents asserted that her forgetting was a manifestation of her attention deficit disorder. And, four, the posting of a grade in that course was discriminatory because ultimately that grade related back to her attention deficit disorder.

In a post-hearing brief dated September 20, 1995 Mr. Muraca, the attorney for the parents, provided suggestions regarding how this Hearing Officer should rule. Mr. Muraca wrote:

> . . . the School District should be enjoined from engaging in any such discriminatory behavior in the future, should be found to be in violation of Hearing Officer Klein's previous Order, should be surcharged with reasonable attorneys' fees and costs of $8500.00 and be compensated for the reckless, wanton, intentional and or negligent behavior of its staff and administration in a sum in excess of $100,000.00.

Of those suggestions, only the first is one that can be ruled on by this Hearing Officer. That is the case in part because the only issue that was raised by the parents at the hearing was whether or not the District discriminated against Meredith by way of its actions in response to Meredith forgetting her gym clothes on February 14, 1994 and March 7, 1994. See N.T. at 13-14, 35-38, 45-46, 122-123, 355-356, 558-559 If this Hearing Officer finds that the District did discriminate against Meredith then it is

within his authority to order that the District refrain from further discrimination.

The second suggestion made by the parents, that the District be found to be in violation of a previous order, cannot be ruled on at the present time because that was not an issue raised at the hearing. Generally, that issue is appropriately addressed through the Pennsylvania Department of Education, Bureau of Special Education, Division of Regional Review complaint process. The ruling by the present Hearing Officer that this is not an appropriate issue for his consideration within the present decision is made without prejudice. It is conceivable that the issue of whether or not a previous order was implemented could be an appropriate issue in a hearing in which discrimination is being claimed, but, as indicated above, that was not an issue raised during the present hearing and therefore cannot be ruled on here. This Hearing Officer will note that if the parents had wanted the District to immediately follow the order of Hearing Officer Klein they could have proceeded with the complaint process in 1992 rather than appealing that order to both the Special Education Appeals Panel and the Federal Court, contributing to the delay in the implementation of that order.

The third suggestion, that the District be required to pay attorney's fees, cannot be considered by this Hearing Officer because he does not have the legal authority to rule on that matter. The provision in federal law, commonly referred to as the attorney's fees provision, and the interpretation of that provision by the courts, makes it clear that the award of attorney's fees can only be made

by a court. As the presider over an administrative hearing, this Hearing Officer does not have the same authority as the courts and does not have the authority to award attorney's fees.

Likewise, the fourth suggestion cannot be ruled on by this Hearing Officer. As the presider over an administrative hearing, this Hearing Officer does not have the authority to order the District to pay punitive damages to the parents. That authority rests in the courts. It should be noted that this Hearing Officer has read the fourth suggestion as requesting that the District be ordered to pay a sum in excess of $100,000.00 to the parents where what was actually written was: " . . . the School District should . . . be compensated in a sum in excess of $100,000.00."

When the present matter came before this Hearing Officer the dispute between Mr. and Mrs. Killino and the Riverside School District already had an extensive history. Meredith began manifesting learning and emotional problems in seventh grade (the 1991-1992 school year). In January 1992 the District received notice from a pediatric neurologist indicating that Meredith suffered from Attention Deficit Disorder (ADD). In the spring of 1992 the District requested a hearing to obtain an order to allow it to evaluate Meredith to determine whether or not she is exceptional under Pennsylvania Code (22 Pa Code § 14) or a protected handicapped student under Pennsylvania Code (22 Pa Code § 15). On October 23, 1992 a decision was rendered in that matter. The order issued as part of that decision was as follows (S-1 at 9):

1. The District shall contact the local Intermediate Unit to provide a psychologist who is unfamiliar with Meredith's case and has never worked previously in the Riverside School District.

2. The psychologist so obtained shall conduct an individual evaluation of Meredith which assesses academic achievement, intellectual and cognitive development as well as administration of scales that have been developed for evaluating children with ADD.

3. Anecdotal reports of Meredith's functioning shall be obtained from each and every one of her instructors to whom she is assigned during this eighth grade year.

4. The evaluations and examinations of Dr. Lilik shall suffice in this matter for the medical assessment portion of this process.

5. A multidisciplinary evaluation shall be conducted in accordance with Sections 14.25 and 342.25 of the Pennsylvania Regulations and Standards.

6. If Meredith does not qualify as an exceptional student requiring an Individualized Education Plan [IEP] under the requirements of special education, she shall be evaluated immediately as a protected handicapped student under Chapter 15 of the Pennsylvania Regulations and Section 504 of the Rehabilitation Act of 1973. Should she be found to qualify under these statutes, a service agreement shall be developed in accordance with Chapter 15 of the Pennsylvania Regulations.

Meredith's parents appealed that decision and on December 10, 1992 Special Education Opinion No. 583, *In Re the Educational Assignment of Meredith K.* was issued upholding the previous decision and adding the following component to the multidisciplinary evaluation (S-2 at 8):

> . . . the MDT must have a knowledgeable person available with specific information regarding the use of appropriate adaptations and interventions for programming students with ADD.

In January 1993, Meredith's parents appealed that ruling by amending an action that had previously been filed in the United States District Court for the Middle District of Pennsylvania. That action was dismissed on September 3, 1993. With the appeals process completed, on October 22, 1993 the District commenced the evaluation process which had been ordered a year earlier.

On February 14, 1994 and March 7, 1994 Meredith forgot her gym clothes and did not participate in her physical education course. Because of that Meredith was required to complete 25 laps for each day that she did not participate in physical education. Meredith's parents filed a complaint in the United States District Court for the Middle District of Pennsylvania in which they alleged that the requirement to complete 25 laps for each day of non-participation was discriminatory punishment and in which they sought declaratory and injunctive relief against the Riverside School District, John F. Rooney, Superintendent of Schools, and physical education teachers Janet Kresge and Deborah Kapelan. That action was dismissed on January 3, 1995 for failure to exhaust administrative remedies.

On February 3, 1995 Meredith's parents requested the present Due Process Hearing. Mr. and Mrs. Killino asserted that Meredith has been diagnosed as having attention deficit disorder and, because of that, she should receive the protections of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. They requested that the District be found to have discriminated against Meredith by way of its actions related to Meredith forgetting her gym clothes on February 14, 1994 and March 7, 1994.

The District's response was two-fold. The first part of the District's response was that Meredith has not been determined to be a protected handicapped student under Section 504 or 22 Pa Code § 15 nor an exceptional student under 22 Pa Code § 14. The District asserted that Meredith's parents have prevented it from completing the evaluations that were ordered on October 23, 1992. The District further asserted that because the evaluations have not been able to be completed Meredith does not have the status of either a protected handicapped student or an exceptional student and therefore there can be no claim of discrimination based on either of those classifications. The second part of the District's response was that the actual events related to Meredith's physical education class are factually quite different from presented by her parents. For reasons that will become clear below, this Hearing Officer need not attempt to determine the specific events that did occur in order to rule on the complaint that was brought before him.

Meredith's parents would like Meredith to be considered to be a protected handicapped student, to have a service plan developed for her, and to have her treated differently from other children in certain specific areas (for

example, in the present matter they apparently want her exempted from the consequences that other children face when they forget their gym clothes). The District would like to complete a multidisciplinary evaluation in order to determine first whether or not Meredith is an exceptional student and then whether or not she may be a protected handicapped student. That dispute has already been addressed in a previous due process hearing and a subsequent appeal to an appellate panel and the District has been ordered to complete such an evaluation.

Meredith's parents may not like the rulings that have come before, but unless they succeed in an appeal of those rulings, they are the law in this matter. Mr. and Mrs. Killino cannot, on the one hand, claim that their child is entitled to protections under the law and, on the other hand, work to prevent evaluations that, in a previous due process hearing, have been found to be necessary in order to determine whether or not Meredith qualifies for those protections and what specific protections are necessary. Mr. and Mrs. Killino simply cannot have it both ways. The language of the Appellate Panel decision rendered on December 10, 1992, Special Education Opinion 583, *In Re the Educational Assignment of Meredith K* is unmistakably clear.

> A thorough evaluation is required before a school district may place a student in special education or provide services under Section 504." S-2 at 6

At the time of the alleged incidents, February and March 1994, the District had not completed the evaluation process in part because of the parents' appeals of the previous rulings and in part because of the parents lack of

cooperation. The parents, particularly Mrs. Killino, have made it clear that they will not allow certain, previously ordered evaluations to be completed. See the testimony of Mrs. Killino, N.T. at 609-610, 711, 714-715 and the testimony of Mr. Bilardi, the school psychologist, N.T. at 279-284, 306-309, 343-345 As long as the parents maintain that position and are successful in preventing the completion of those previously ordered evaluations they will be successful in preventing their daughter from being considered an exceptional student or a protected handicapped student under 22 Pa Code § 14, 22 Pa Code § 15, or under Section 504 of the Rehabilitation Act of 1973. As long as Meredith's parents are successful at preventing Meredith from being considered an exceptional student or a protected handicapped student, Meredith will not be eligible for any modifications, adaptations, or protections in her academic program and there will be no basis for any claim of discrimination.

Because, at the time of the alleged incidents, February and March 1994, Meredith had not been determined to be an exceptional student or a protected handicapped student through the previously ordered evaluation process, the conclusion that must be reached by this Hearing Officer is that no discrimination could have occurred. The specific events in dispute need not be ruled on by this Hearing Officer because, at the time of the disputes, Meredith was not entitled to any special protections under 22 Pa Code §§ 14 and 15 or under Section 504 of the Rehabilitation Act of 1973.

The above ruling on Meredith's parents' claim of discrimination should not be taken as a statement of support for the District's posture in this matter. The District has not

proceeded in an entirely exemplary fashion in this matter. Once the appeals process was completed, the District had the obligation to move forward with the evaluations that had been ordered, it did not. What happened instead was that the District's chosen school psychologist decided that, in light of the parents' objections to the evaluations, he could not proceed with the evaluations, a position the District has apparently supported for the past two years. According to Mr. Bilardi, the school psychologist, when he first contacted the parents in November 1993, Mrs. Killino informed him that she would not give her permission to have Meredith evaluated. Mr. Bilardi then decided not to proceed with the evaluation because he believed it would be unethical to complete an evaluation without parental permission and because he believed that, given the stance of Meredith's parents, the results would not be valid. Mr. Bilardi testified that he then attempted to assist the District and the parents to provide "resolution of some of the difficulties." N.T. at 282 While Mr. Bilardi's ethical stance and his attempt to provide a resolution may be commendable under many circumstances, resolution regarding the evaluations had already been provided by way of previous administrative orders. The District had already gone through a due process hearing seeking permission to evaluate. That permission was granted by the Hearing Officer in that matter and the District was ordered to complete the evaluations. It should be noted that the Hearing Officer did not suggest that the evaluations be completed, but rather he ordered that they be completed. At the time of the events in physical education in February and March 1994 those evaluations had not been completed. That delay is excusable because it

was largely due to the lengthy process of the appeals initiated by Meredith's parents, the "stay put" provision during the appeals process which prevented the District from beginning the evaluation, and the lack of cooperation on the part of Meredith's parents in the evaluation once their final appeal had been dismissed. What is not excusable is the fact that today, two years after that final appeal was dismissed, the District has still not completed those evaluations. The District appears to want to be able to claim it need not provide any accommodations, adaptations, or protections to Meredith without a full evaluation and, at the same time, it wants to claim that it cannot complete that evaluation without the cooperation of Meredith's parents. That is not so, 22 Pa Code §§ 14.25(c)(6) clearly provides for such a situation when it states:

> A multidisciplinary evaluation shall be initiated if . . . A hearing officer or judicial decision orders a multidisciplinary evaluation.

The District has already gone through the due process procedures to obtain such an order. Now that it has that order the District is obligated to follow it. If the District wishes to adopt the position of the school psychologist that, without the parents' permission, it would be unethical and invalid to proceed with certain aspects of that order, then the District must either obtain the parents' permission, obtain their permission to proceed in a different manner, or return to the due process hearing forum to obtain a modification of that order. The District cannot legitimately claim that, because of Meredith's parents refusal to grant permission to evaluate and lack of cooperation, it cannot proceed. Both 22 Pa Code § 14 and 22 Pa Code § 15 make it clear that the District not only *can*

proceed, but that it *must* proceed to determine whether or not Meredith is an exceptional student or a protected handicapped student.

Because this Hearing Officer was only asked to rule on the very narrow issue of whether or not the District discriminated against Meredith by way of its actions in response to Meredith forgetting her gym clothes on February 14, 1994 and March 7, 1994, and because the issue of whether or not the District has complied with a previous Hearing Officer's order is usually a matter for the Division of Compliance (or, as noted above, possibly another hearing where it is raised as a specific issue under a claim of discrimination), this Hearing Officer will only note, but will not rule on the extreme delay that apparently continues until this day in complying with the previous Hearing Officer's order. He would offer the suggestion that the District either proceed with the ordered evaluation or return to the due process forum to obtain a modification of the previous order.

* * *

In conclusion, Mr. and Mrs. Killino, the parents of Meredith Killino, have alleged that their daughter was punished for forgetting her gym clothes on February 14, 1994 and March 7, 1994. Mr. and Mrs. Killino further allege that the punishment constituted discrimination on the part of the Riverside School District because Meredith should have been considered a protected handicapped student. Because at the time of the alleged incidents an evaluation to determine whether or not Meredith Killino was an exceptional student (under 22 Pa Code § 14) or a protected handicapped student (under Section 504 and 22

Pa Code § 15) had not been completed and because the District had been required by both a Hearing Officer and an Appellate Panel to complete such an evaluation before it could provide special services or protections to Meredith, and further, because the delay in completing the evaluation was in large part due to the filing of appeals by Meredith's parents and to their lack of cooperation in completing that evaluation, it is the determination of this Hearing Officer that no discrimination occurred. Moreover, because Meredith was neither classified as an exceptional student nor a protected handicapped student at the time of the alleged incidents, she was not entitled to the protections of 22 Pa Code §§ 14 and 15 or Section 504 of the Rehabilitation Act of 1973, and any claim of discrimination under those statutes must fail.

Accordingly we make the following:

ORDER

The Riverside School District did not discriminate against Meredith Killino.

IN THE SPECIAL EDUCATION
DUE PROCESS APPEALS REVIEW PANEL
COMMONWEALTH OF PENNSYLVANIA

IN RE THE EDUCATIONAL ASSIGNMENT OF MEREDITH K., A STUDENT IN THE RIVERSIDE SCHOOL DISTRICT	:	SPECIAL EDUCATION OPINION NUMBER 693

BEFORE APPEALS PANEL MEMBERS SALVIA, HARTWIG AND GONICK

OPINION BY GONICK, APPELLATE OFFICER

BACKGROUND

Meredith K. is a 16 year old 11th grade student who resides in the Riverside School District (District). Meredith is at the center of a dispute between her parents and the District which has been going on for over three years.

In 1992 the District sought permission to conduct a comprehensive evaluation of Meredith to determine whether she was an eligible student entitled to special education and related services under the Individuals With Disabilities Education Act (IDEA)[1] and 22 Pa. Code Chapter 14, or a protected handicapped student under Section 504 of the Rehabilitation Act of 1973 (Section

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[1] 20 U.S.C. Sections 1400-1485

504)[2] and 22 Pa. Code Chapter 15.[3] The parents refused the District's request. On October 23, 1992, after a due process hearing which lasted four sessions, the hearing officer granted the District's request for a comprehensive evaluation of Meredith. The parents appealed. On December 10, 1992, the Special Education Appeals Panel dismissed the parents' exceptions and affirmed in all respects the decision of the hearing officer. *In Re: The Educational Assignment of Meredith K.*, Special Education opinion Number 583 (1992).[4] The parents then appealed the ruling of the Appeals Panel. The appeal was consolidated with an action which the parents had filed previously in the United States District Court for the Middle District of Pennsylvania in May of 1992.[5] On September 3, 1993, the District Court dismissed the parents' action for their failure to exhaust administrative remedies.[6] The Court's dismissal concluded the litigation with respect to the evaluation request in the District's favor.[7]

Thereafter, by letter dated October 22, 1993, the District began the process necessary to evaluate Meredith.[8] Due in large part to the parents' refusal to cooperate with the District's effort to evaluate Meredith, the District has

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[2] 29 U.S.C. Section 794

[3] See S-1; N.T. 716-717

[4] See S-2; N.T. 717

[5] S-3; N.T. 717-719

[6] S-3

[7] N.T. 718-721

[8] S-4

been unable to begin, let alone complete, the comprehensive evaluation ordered by the hearing officer and Appeals Panel in 1992.[9]

In 1994 the parents filed a second action in the District Court for the Middle District of Pennsylvania.[10] In this action, the parents alleged that the District had discriminated against Meredith in violation of the United States Constitution and Section 504.[11] They alleged, in particular, that Meredith was subjected to corporal punishment by her gym teachers in that she was required to run and/or walk 25 laps around the gym floor for each of two instances in which she forgot her gym clothes. The parents argued that Meredith is a protected handicapped student, under Section 504 based upon her medical diagnosis of attention deficit disorder (ADD); that her forgetfulness is related to her ADD; and that to punish her by requiring her to run and/or walk laps was discriminatory in light of her protected handicapped status. On January 3, 1995, the District Court dismissed this action finding that the parents were required to exhaust administrative remedies and that they had failed to do so.[12]

Consequently, the parents initiated the present due process proceeding. A hearing was held on March 16, 1995, April 10, 1995, July 7, 1995, and August 21, 1995. At the initial session, and at each subsequent session, the

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[9] N.T. 76, 84-85, 159, 280-281, 282, 284, 295-296, 306-309, 343-344, 480, 489-490, 585-586, 597-598, 609-611, 625-626, 649-651, 657, 710-711, 714-715.

[10] N.T. 108-112; S-14

[11] S-14

[12] S-14

parties agreed that the issue was whether the District had discriminated against Meredith.[13] The parents contended that the District discriminated against Meredith by requiring her to run laps for forgetting her gym clothes, a manifestation of her ADD; that the punishment employed was discriminatory because Meredith may experience tachycardia (rapid heartbeat) as a result of the medication she takes for her ADD; that the District discriminated against Meredith by giving her an unsatisfactory grade when she failed to run the laps; and that the District discriminated against her because it posted her unsatisfactory grade in the gym office window. The District countered that no discrimination occurred because no evaluation has ever been completed which establishes that Meredith is a protected handicapped student under Section 504. The District argued that absent a showing that Meredith was a protected handicapped student at the time the alleged discriminatory acts occurred, there can be no finding that the actions of the District violated Section 504. The District also maintained that the parents were not accurate in their recitation of the circumstances which constituted the alleged discrimination.

The hearing officer concluded that no discrimination had occurred. He noted that the District previously had been ordered to conduct an evaluation to determine whether Meredith was an exceptional student under IDEA and Chapter 14 or a protected handicapped student, under Section 504 and Chapter 15. The hearing officer found that the evaluation had not been completed because the parents had filed appeals and had failed to

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[13] N.T. 45-49, 122-123, 355-356, 433-434, 558-559

cooperate. He further held that because Meredith was not classified as an exceptional student or a protected handicapped student at the time of the alleged incidents, the parents' claims of discrimination must fail.

The parents filed eight exceptions. These exceptions, in one way or another, challenge the hearing officer's findings and conclusions that: (1) prior decisions are the law of this case and require the District to complete a comprehensive evaluation of Meredith; (2) that evaluation has yet to be completed; (3) the District's failure to complete the evaluation is attributable to a great degree to a lack of cooperation on the part of the parents; and (4) until such time as the evaluation is completed, Meredith cannot be classified as an exceptional student under IDEA or a protected handicapped student under Section 504.

DECISION

The District Court for the Middle District of Pennsylvania has issued two rulings which are of critical importance to the Panel's consideration of this matter. By the parents' own admission, the District Court decision issued on September 3, 1993, dismissed the parents' action and upheld the prior order of the Due Process Appeals Review Panel granting the District's request to comprehensively evaluate Meredith.[14] The second ruling, issued January 3, 1995, in the context of the parents' claims of discrimination arising out of the gym incidents, determined that the parents must exhaust administrative

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[14] S-1, S-2 and S-3; N.T. 717-721

remedies because the conduct complained of was within the "ambit" of IDEA.[15]

Reduced to its essence, the argument of the parents is that the Panel should ignore these federal court decisions and simply declare that Meredith was a protected handicapped student under Section 504 when the alleged discrimination occurred. While the parents may feel that they are not bound by the rulings of the federal district court in this matter, this Panel harbors no such illusion. As the District aptly notes, those decisions are the law of this case.[16] In spite of the parents determined efforts to obscure and avoid the present procedural and substantive posture of their case, the fact remains that Meredith still has not been evaluated. Absent such evaluation, the District and this Panel are without authority to declare that Meredith is an eligible student under IDEA or a protected handicapped student under Section 504.[17] Until

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[15] S-14, p. 5

[16] The law is settled with respect to this issue. See *P.J. v. Connecticut Board of Education*, 788 F. Supp. 673 (D.Conn. 1992) which holds that the program or placement of a child may not be ordered until an evaluation has been completed; 34 CFR 300.531.

[17] The Panel is well aware of the arguments the parents advance to support their contention that Meredith does not need to be evaluated. The parents principally rely on certain policy statements, and on the circumstances surrounding the preparation of the proposed Student Accommodation Plan (P-16), to support their contention that Meredith does not need to be evaluated and that the District by its actions in moving towards a service agreement (N.T. 103, 177-178, 288-291, 293-294, 317, 461, 492, 612-613, 614) is estopped to deny this contention. The policy statements are a September 24, 1992,

such time as Meredith's comprehensive evaluation is completed, and the multidisciplinary team arrives at a decision concerning her status, Meredith's pendent placement will remain what it is today – in regular education. Because Meredith was not a protected handicapped student in 1994, the hearing officer correctly determined that the District did not discriminate against her.

Meredith's evaluation is long overdue. The District properly instituted due process in order to secure the relief necessary to undertake the evaluation. Having obtained the order it sought, the District is required to see this process through. The Panel does not have the power to force Meredith's parents to cooperate. However, for Meredith's sake, it is now time for the District and the parents to set their contention aside so that the evaluation may be completed without further delay.

ORDER

Accordingly, this ___ day of November, 1995, the hearing officer's order is affirmed, and those exceptions not specifically addressed by this Decision and order are dismissed. Within 45 days, the District shall complete comprehensive psychological, educational, social and

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Memorandum from the Pennsylvania Department of Education (P-17; N.T. 474-478) which states that a psychological test is not necessary to qualify a student for Section 504 services, and the June 14, 1994, joint policy memorandum alluded to on page 2 of the parents' Post Hearing Memorandum. These arguments are not persuasive in view of the decision of the Appeals Panel, undisturbed by the District Court, that Meredith *must be evaluated.*

emotional, and medical evaluations of Meredith which assess all areas of suspected exceptionality. The psychological, eduational [sic], social and emotional evaluations shall be conducted by an independent school psychologist currently certified in the Commonwealth of Pennsylvania. The medical evaluation shall be conducted by a physician licensed by the Commonwealth of Pennsylvania. These evaluations shall be conducted at the District's expense. Until such time as the multidisciplinary evaluation is received and the multidisciplinary team makes its recommendations, Meredith shall be considered to be a student who is not exceptional under IDEA and not protected under Section 504, and her pendent placement shall be in regular education.

In accordance with 22 Pa. Code Section 14.64 (m) the parties are advised that this matter may be appealed to the Commonwealth Court of Pennsylvania or to the appropriate federal district court.

/s/ Jeffrey Gonick
Jeffrey Gonick,
for the Appeals Panel

Signature Date November 10, 1995

Mailing Date November 10, 1995

Joint Policy Memorandum of the United States Department of Education

18 INDIV. DISABIL. EDUC. L. RPTR. 116

Office of Special Education and Rehabilitative Services

September 16, 1991

Robert R. Davila, Assistant Secretary, Office of Special Education and Rehabilitative Services. Michael L. Williams, Assistant Secretary, Office for Civil Rights. John T. MacDonald, Assistant Secretary, Office of Elementary and Secondary Education.

Summary

The Assistant Secretaries for the Office of Special Education and Rehabilitative Services, the Office for Civil Rights, and the Office of Elementary and Secondary Education issued a joint memorandum on the provision of educational services to children with attention deficit disorder (ADD). According to the memorandum, children with ADD who require special education or related services are presently eligible under the IDEA categories of "other health impairment," "specific learning disability," or "serious emotional disturbance." Therefore, a separate category for ADD conditions is not necessary under the IDEA. In addition, children with ADD who do not require special education or related services may nevertheless be covered by the Section 504 regulations if their ADD substantially limits a major life activity, such as learning. Under Section 504, school districts are obligated to provide regular or special education programs, including

necessary modifications and supplementary aids and services, to qualified children with ADD based on their individual needs.

I. Introduction

There is a growing awareness in the education community that attention deficit disorder (ADD) and attention deficit hyperactive disorder (ADHD) can result in significant learning problems for children with those conditions.[1] While estimates of the prevalence of ADD vary widely, we believe that three to five percent of school-aged children may have significant educational problems related to this disorder. Because ADD has broad implications for education as a whole, the Department believes it should clarify State and local responsibility under Federal law for addressing the needs of children with ADD in the schools. Ensuring that these students are able to reach their fullest potential is an inherent part of the National education goals and AMERICA 2000. The National goals, and the strategy for achieving them, are based on the assumptions that: (1) all children can learn and benefit from their education; and (2) the educational community must work to improve the learning opportunities for all children.

This memorandum clarifies the circumstances under which children with ADD are eligible for special education services under Part B of the Individuals with Disabilities Education Act (Part B), as well as the Part B requirements for evaluation of such children's unique educational needs. This memorandum will also clarify the responsibility of State and local educational agencies

(SEAs and LEAs) to provide special education and related services to eligible children with ADD under part B. Finally, this memorandum clarifies the responsibilities of LEAs to provide regular or special education and related aids and services to those children with ADD who are not eligible under Part B, but who fall within the definition of "handicapped person" under Section 504 of the Rehabilitation Act of 1973. Because of the overall educational responsibility to provide services for these children, it is important that general and special education coordinate their efforts.

II. Eligibility for Special Education and Related Services under Part B

Last year during the reauthorization of the Education of the Handicapped Act [now the Individuals with Disabilities Education Act], Congress gave serious consideration to including ADD in the definition of "children with disabilities" in the statute. The Department took the position that ADD does not need to be added as a separate disability category in the statutory definition since children with ADD who require special education and related services can meet the eligibility criteria for services under Part B. This continues to be the Department's position.

No change with respect to ADD was made by Congress in the statutory definition of "children with disabilities"; however, language was included in Section 102(a) of the Education of the Handicapped Act Amendments of 1990 that required the Secretary to issue a Notice of

Inquiry (NOI) soliciting public comment on special education for children with ADD under Part B. In response to the NOI (published November 29, 1990 in the *Federal Register,*) the Department received over 2000 written comments, which have been transmitted to the Congress. Our review of these written comments indicates that there is confusion in the field regarding the extent to which children with ADD may be served in special education programs conducted under Part B.

A. Description of Part B

Part B requires SEAs and LEAs to make a free appropriate public education (FAPE) available to all eligible children with disabilities and to ensure that the rights and protections of Part B are extended to those children and their parents. 20 U.S.C. 1412(2); 34 CFR §§ 300.121 and 300.2. Under Part B, FAPE, among other elements, includes the provision of special education and related services, at no cost to parents, in conformity with an individualized education program (IEP). 34 CFR § 300.4.

In order to be eligible under Part B, a child must be evaluated in accordance with 34 CFR §§ 300.530-300.534 as having one or more specified physical or mental impairments, and must be found to require special education and related services by reason of one or more of these impairments.[2] 20 U.S.C. 1401(a)(1); 34 CFR § 300.5. SEAs and LEAs must ensure that children with ADD who are determined eligible for services under Part B receive special education and related services designed to meet their unique needs, including special education and

related services needs arising from the ADD. A full continuum of placement alternatives, including the regular classroom, must be available for providing special education and related services required in the IEP.

B. Eligibility for Part B services under the "Other Health Impaired" Category

The list of chronic or acute health problems included within the definition of "other health impaired" in the Part B regulations is not exhaustive. The term "other health impaired" includes chronic or acute impairments that result in limited alertness, which adversely affects educational performance. Thus, children with ADD should be classified as eligible for services under the "other health impaired" category in instances where the ADD is a chronic or acute health problem that results in limited alertness, which adversely affects educational performance. In other words, children with ADD, where the ADD is a chronic or acute health problem resulting in limited alertness, may be considered disabled under Part B solely on the basis of this disorder within the "other health impaired" category in situations where special education and related services are needed because of the ADD.

C. Eligibility for Part B services under other Disability Categories

Children with ADD are also eligible for services under Part B if the children satisfy the criteria applicable to other disability categories. For example, children with ADD are also eligible for services under the "specific

learning disability" category of Part B if they meet the criteria stated in §§ 300.5(b)(9) and 300.541 or under the "seriously emotionally disturbed" category of Part B if they meet the criteria stated in § 300.5(b)(8).

III. Evaluations under Part B

A. Requirements

SEAs and LEAs have an affirmative obligation to evaluate a child who is suspected of having a disability to determine the child's need for special education and related services. Under Part B, SEAs and LEAs are required to have procedures for locating, identifying and evaluating all children who have a disability or are suspected of having a disability and are in need of special education and related services. 34 CFR §§ 300.128 and 300.220. This responsibility, known as "child find," is applicable to all children from birth through 21, regardless of the severity of their disability.

Consistent with this responsibility and the obligation to make FAPE available to all eligible children with disabilities, SEAs and LEAs must ensure that evaluations of children who are suspected of needing special education and related services are conducted without undue delay. 20 U.S.C. 1412(2). Because of its responsibility resulting from the FAPE and child find requirements of Part B, an LEA may not refuse to evaluate the possible need for special education and related services of a child with a prior medical diagnosis of ADD solely by reason of that medical diagnosis. However, a medical diagnosis of ADD alone is not sufficient to render a child eligible for services under Part B.

Under Part B, before any action is taken with respect to the initial placement of a child with a disability in a program providing special education and related services, "a full and individual evaluation of the child's educational needs must be conducted in accordance with requirements of § 300.532." 34 CFR § 300.531. Section 300.532(a) requires that a child's evaluation must be conducted by a multidisciplinary team, including at least one teacher or other specialist with knowledge in the area of suspected disability.

B. Disagreements over Evaluations

Any proposal or refusal of an agency to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child is subject to the written prior notice requirements of 34 CFR §§ 300.504-300.505.[3] If a parent disagrees with the LEA's refusal to evaluate a child or the LEA's evaluation and determination that a child does not have a disability for which the child is eligible for services under Part B, the parent may request a due process hearing pursuant to 34 CFR §§ 300.506-300.513 of the Part B regulations.

IV. Obligations Under Section 504 of SEAs and LEAs to Children with ADD Found Not To Require Special Education and Related Services under Part B

Even if a child with ADD is found not to be eligible for services under Part B, the requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 CFR Part 104 may be

applicable. Section 504 prohibits discrimination on the basis of handicap by recipients of Federal funds. Since Section 504 is a civil rights law, rather than a funding law, its requirements are framed in different terms than those of Part B. While the Section 504 regulation was written with an eye to consistency with Part B, it is more general, and there are some differences arising from the differing natures of the two laws. For instance, the protections of Section 504 extend to some children who do not fall within the disability categories specified in Part B.

A. Definition

Section 504 requires every recipient that operates a public elementary or secondary education program to address the needs of children who are considered "handicapped persons" under Section 504 as adequately as the needs of nonhandicapped persons are met. "Handicapped person" is defined in the Section 504 regulation as any person who has a physical or mental impairment which substantially limits a major life activity (*e.g.*, learning). 34 CFR § 104.3(j). Thus, depending on the severity of their condition, children with ADD *may* fit within that definition.

B. Programs and Services Under Section 504

Under Section 504, an LEA must provide a free appropriate public education to each qualified handicapped child. A free appropriate public education, under Section 504, consists of regular or special education and related aids and services that are designed to meet the

individual student's needs and based on adherence to the regulatory requirements on educational setting, evaluation, placement, and procedural safeguards. 34 CFR §§ 104.33, 104.34, 104.35, and 104.36. A student may be handicapped within the meaning of Section 504, and therefore entitled to regular or special education and related aids and services under the Section 504 regulation, even though the student may not be eligible for special education and related services under Part B.

Under Section 504, if parents believe that their child is handicapped by ADD, the LEA must evaluate the child to determine whether he or she is handicapped as defined by Section 504. If an LEA determines that a child is not handicapped under Section 504, the parent has the right to contest that determination. If the child is determined to be handicapped under Section 504, the LEA must make an individualized determination of the child's educational needs for regular or special education or related aids and services. 34 CFR § 104.35. For children determined to be handicapped under Section 504, implementation of an individualized education program developed in accordance with Part B, although not required, is one means of meeting the free appropriate public education requirements of Section 504.[4] The child's education must be provided in the regular education classroom unless it is demonstrated that education in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR § 104.34.

Should it be determined that the child with ADD is handicapped for purposes of Section 504 and needs only adjustments in the regular classroom, rather than special

education, those adjustments are required by Section 504. A range of strategies is available to meet the educational needs of children with ADD. Regular classroom teachers are important in identifying the appropriate educational adaptations and interventions for many children with ADD.

SEAs and LEAs should take the necessary steps to promote coordination between special and regular education programs. Steps also should be taken to train regular education teachers and other personnel to develop their awareness about ADD and its manifestations and the adaptations that can be implemented in regular education programs to address the instructional needs of these children. Examples of adaptations in regular education programs could include the following:

> providing a structured learning environment; repeating and simplifying instructions about in-class and homework assignments; supplementing verbal instructions with visual instructions; using behavioral management techniques; adjusting class schedules; modifying test delivery; using tape recorders, computer-aided instruction, and other audio-visual equipment; selecting modified textbooks or workbooks; and tailoring homework assignments.

Other provisions range from consultation to special resources and may include reducing class size; use of one-on-one tutorials; classroom aides and note takers; involvement of a "services coordinator" to oversee implementation of special programs and services, and possible modification of nonacademic times such as lunchroom, recess, and physical education.

Through the use of appropriate adaptations and interventions in regular classes, many of which may be required by Section 504, the Department believes that LEAs will be able to effectively address the instructional needs of many children with ADD.

C. Procedural Safeguards Under Section 504

Procedural safeguards under the Section 504 regulation are stated more generally than in Part B. The Section 504 regulation requires the LEA to make available a system of procedural safeguards that permits parents to challenge actions regarding the identification, evaluation, or educational placement of their handicapped child whom they believe needs special education or related services. 34 CFR § 104.36. The Section 504 regulation requires that the system of procedural safeguards include notice, an opportunity for the parents or guardians to examine relevant records, an impartial hearing with opportunity for participation by the parents or guardian and representation by counsel, and a review procedure. Compliance with procedural safeguards of Part B is one means of fulfilling the Section 504 requirement.[5] However, in an impartial due process hearing raising issues under the Section 504 regulation, the impartial hearing officer must make a determination based upon that regulation.

V. Conclusion

Congress and the Department have recognized the need to provide information and assistance to teachers,

administrators, parents and other interested persons regarding the identification, evaluation, and instructional needs of children with ADD. The Department has formed a work group to explore strategies across principal offices to address this issue. The work group also plans to identify some ways that the Department can work with the education associations to cooperatively consider the programs and services needed by children with ADD across special and regular education.

In fiscal year 1991, the Congress appropriated funds for the Department to synthesize and disseminate current knowledge related to ADD. Four centers will be established in Fall, 1991 to analyze and synthesize the current research literature on ADD relating to identification, assessment, and interventions. Research syntheses will be prepared in formats suitable for educators, parents and researchers. Existing clearinghouses and networks, as well as Federal, State and local organizations will be utilized to disseminate these research syntheses to parents, educators and administrators, and other interested persons.

In addition, the Federal Resource Center will work with SEAs and the six regional resource centers authorized under the Individuals with Disabilities Education Act to identify effective identification and assessment procedures, as well as intervention strategies being implemented across the country for children with ADD. A document describing current practice will be developed and disseminated to parents, educators and administrators, and other interested persons through the regional resource centers network, as well as by parent

training centers, other parent and consumer organizations, and professional organizations. Also, the Office for Civil Rights' ten regional offices stand ready to provide technical assistance to parents and educators.

It is our hope that the above information will be of assistance to your State as you plan for the needs of children with ADD who require special education and related services under Part B, as well as for the needs of the broader group of children with ADD who do not qualify for special education and related services under Part B, but for whom special education or adaptations in regular education programs are needed. If you have any questions, please contact Jean Peelen, Office for Civil Rights; (Phone: 202/732-1635), Judy Schrag, Office of Special Education Programs (Phone: 202/732-1007); or Dan Bonner, Office of Elementary and Secondary Education (Phone: 202/401-0984).

Notes

[1] While we recognize that the disorders ADD and ADHD vary, the term ADD is being used to encompass children with both disorders.

[2] The Part B regulations define 11 specified disabilities. 34 CFR § 300.5(b)(1)-(11). The Education of the Handicapped Act Amendments of 1990 amended the Individuals with Disabilities Education Act [formerly the Education of the Handicapped Act] to specify that autism and traumatic brain injury are separate disability categories. *See* section 602(a)(1) of the Act, to be codified at 20 U.S.C. 1401(a)(1).

[3] Section 300.505 of the Part B regulations sets out the elements that must be contained in the prior written notice to parents:

> (1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;
>
> (2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take action, and a description of any options the agency considered and the reasons why those options were rejected;
>
> (3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and
>
> (4) A description of any other factors which are relevant to the agency's proposal or refusal.

34 CFR § 300.505(a)(1)-(4).

[4] Many LEAs use the same process for determining the needs of students under Section 504 that they use for implementing Part B.

[5] Again, many LEAs and some SEAs are conserving time and resources by using the same due process procedures for resolving disputes under both laws.